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HISTORY

OF

THE LAW OF TITHES

IN ENGLAND.

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PREFACE.

THE following pages are extracted from an essay which was commended by the Examiners appointed by the University of Cambridge to adjudge the York prize for the year 1887. They have been printed in the hope that even so bare a statement of facts may prove useful in the present vexed state of the subject. I have refrained from setting out the more modern enactments at length in the firm faith that the statutes themselves are, if not in the mind, at least on the shelves of any possible reader. It is perhaps right to mention that this essay was necessarily sent in before the appearance of Lord Selborne's book on tithes, for otherwise I should not have ventured to write on so much of the subject as is treated in that work.

G. E. J.

11, *King's Bench Walk.*

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LIST OF AUTHORITIES.

	Abbreviations.
Ancient Laws and Institutes—Thorpe	A. L. & I.
Bede's "History"	Bede.
Bede's Works.	
Blackstone's "Commentaries."	
Bracton (Record Office).	
Carte's "History of England"	Carte.
Coke's "Institutes"	Inst.
Degge.	
Eagle & Young	E. & Y.
Elderfield.	
Godolphin.	
Gwillim's "Tithe Cases." 4 vols.	G.
Haddon & Stubbs. 3 vols.	H. & S.
Hobart.	
Kemble's "Saxons in England"	Kemble.
Lingard's "Anglo-Saxon Church"	Lingard.
Lyndwood's "Provinciale."	
Mirehouse.	
Rayner's "Tithe Cases."	
Rowe.	
Selborne, Lord, "Ancient Facts and Fictions concerning Tithes"	L. Selborne's Tithes.
Selborne, Lord, "Case for the Church," 1887 ..	L. Selborne.
Selden's "History of Tithes"	Selden.
Soames' "Anglo-Saxon Church"	Soames.
Spelman's "Concilia"	Spelman's Conc.
Spelman's "Larger Work on Tithes"	Spelman.
Tilsley's "Answer to Selden"	Tils.
Wilkins' "Concilia"	Wilkins.

HISTORY

OF

THE LAW OF TITHES

IN

ENGLAND.

CHAPTER I.

ESTABLISHMENT OF THE LAW OF TITHES.

THE history of the law of tithes in England in the earliest period which it is necessary to consider, *i.e.*, in the three centuries preceding the Legatine Synod of 786 A.D., is a history of adaptation. This adaptation was directed throughout by ecclesiastics, on this point not differing from Rome. It is therefore unnecessary to enter on the question, so often disputed, whether tithes were in fact due by divine right, or only by human law; sufficient it is to notice that those whose operations we have to follow believed, and had the authority of the Church for believing, that tithes were due *jure divino*. 550 A.D.

The property of the ancient priesthood with which it was possible for the Christian missionaries to deal, and with some of which we know that they did deal, consisted probably of:— Bede I. 30

I. Temples, in almost all cases built of wood, but in a few places of stone. Bede III. 25 Bede II. 14

550 A.D. II. Land occupied originally by collections of priests or granted to them by princes.

Lingard I. 261 I. H. & S. 37 III. The revenue derived from votive offerings or voluntary gifts and various customary payments.[1]

The temples were in many cases adopted for Christian worship; probably in almost every case where the building was suitable and was not irretrievably spoilt in the first rush of Christianity.

Bede I. 30, 32 We know that Pope Gregory re-considered his former decision ordering their destruction, and wrote to Mellitus, that "in places where they were well made, the temples were to be altered from the worshipping of devils into the service of God; that while the people did not see their temples spoiled, they might, forsaking their error, be moved the more often to haunt their wonted place, to the honour and service of God." And that these instructions were carried out, appears from the fact that a century and a half later the temples of the idols in Bede III. 30 Essex and London were temporarily restored to their old worship by Sigher. It is at least probable that where the temples were retained, the possessions and revenues attached to them were also converted to Christian use.

Carte I. 293, 294 As is pointed out by Carte, "when the Saxons, become Christians, subdued any part of the territories of the Britons, their kings gave to their own clergy such possessions as had belonged to the British; and it may reasonably be presumed that they took the same method in their own country when Paganism was abolished, and assigned them likewise possessions, revenues and rights which had belonged to the heathen priests, for the maintenance of their families and the exercise of a religion much more expensive in its sacrifices than the Christian."

[1] There probably existed a customary right to take wood for the repairs of such temples, and by Cnut's Dooms it was provided that: "To Church bot all men must lawfully give assistance."—*Code of Howel Dda*, II., VIII. 40; *I. H. & S.* 273; *A. L. & I.* 176.

It is probable that from these rules originated the difference in England of the Common Law and the Canon Law as to repairing churches.

The revenues must have been large, though probably not regular; for numerous instances show that it was not uncommon for some aliquot part of the spoils of war to be given, *e.g.*, even as late as 680 A.D., we know that Cadwalla, King of Wessex, who is said to have tithed[1] all his spoils of war to the Deity, bargained to give one-fourth of the Isle of Wight to God if he took it, and fulfilled his compact by handing over 300 tenements to Wilfrid. Voluntary offerings are not so easily traced, being usually made under less striking circumstances; but that they were a matter of importance to the early Christian priests is shown by the suggestion of Gilda (*circa* 550 A.D.), that the rich received better treatment than the poor. It is not possible to ascertain the origin of any of the customary payments in England, though possibly Church scot[2] dated from pagan times. And we are led to believe that it was so from the continuity of its attachment to the "old minster" rather than accept Kemble's suggestion that it was originally a recognitory service due to the Lord by tenants of Church lands. The existence of customary payments under analogous circumstances and their connection with tithes are well illustrated by the code of laws in Ireland, recorded in the Senchus Mor, for we are there enabled to see how the ecclesiastical authorities condescended to use the old methods to justify their receipt of a revenue under the new name.

550 A.D.

Bede IV. 16
Selden, 269

Kemble II. 492

In the Senchus Mor, which claims to be based on the

[1] This probably only means, gave an aliquot part. The passage is: "Arduum memoratum est, quantum etiam ante baptismum inservierit pietati, ut omnes manubias, quas jure praedatorio in suos usus transcripserat, Deo decimaret. In quo etsi approbamus affectum, improbamus exemplum.—*William of Malmesbury*, I. 34.

And Selden tells us that: "Earlier still the German Saxons were wont to sacrifice the tenth of all captives taken in their piracies and incursions made by sea, upon the Gauls especially.—*Selden*, 270.

[2] Certam mensuram bladi tritici significat, quam quilibet olim sanctae Ecclesiae die Sancti Martini, tempore tam Britonum quam Anglorum contribuerunt.—*Fleta* I. 42 (I. 47 in second edition).

Lingard thinks that Church scot, like tithe, was a foreign importation.—*Lingard*, I. 190, *note*.

550 A.D. law of nature, the patriarchal law, the prophetic law, and the law of the New Testament. The words are:—

Ancient Laws of Ireland, I. 260, 261 (Record Office) I. 50–52 II. 344–347

"There are three things which are paid—viz., tithes, first-fruits, and alms, which prevent the period of a plague and the suspension of amity between a king and the country, and which also prevent the occurrence of a general war."

"The social connection which subsists between the Church and its tenants of ecclesiastical lands is preaching and offering; and requiem for souls is due from the Church to its tenants of ecclesiastical lands, and the receiving of every son for instruction and of every such tenant to right repentance. Tithes and first-fruits and alms are due of them to her, and full honour price when they are in strong health, and one-third honour price at the time of death, and every first calf, and every first lamb, and every firstborn of children, and every tenth child from that out. And the Church has the power of pronouncing judgment and proof and witness upon its tenants of ecclesiastical lands, both saer stock tenants and daer stock tenants, and upon every other layman, even though he be a saer stock tenant of ecclesiastical lands, unless there is another Church of equal dignity claiming him."

In another MS.

II. 354–355. Doubtful authority, H. & S.

"The implied duty of the Church is the feeding of the last survivor without a tribe, without land, without cattle, and of every son left destitute, and of every tenant of ecclesiastical lands. And the implied duty of a tenant of ecclesiastical lands, *i.e.* the tenth," etc.

From these extracts it appears that an assembly of priests (one at least of very great ability, viz., Saint Patrick) and princes, during this time of transition, preferred to class the right to tithes with the old customary revenue, and to name the same inducements for their payment, rather than to rest their case on the *jus divinum*.

Amongst the clergy of the Primitive Church, many considerations tend to show that tithe was not generally received.[1] In the first place, it was not the policy of the

[1] "They took of them whom they instructed only so much as might serve their necessities."—*Bede* I. 26.

Church to frighten converts by temporal exactions before the faith was firmly established. The Apostles did not take all that was due to them because it was inexpedient, and similarly Alchwin, in his epistle to Charles the Great, advises that it were better for the Christian cause to omit taking tithe amongst the Huns and Saxons until they were grown firm in the faith. Moreover, the Primitive Church only retained what was absolutely necessary for existence, and re-distributed the remainder of what was received. Tithes also were not suited for those who led a wandering life, while those monks who were settled were usually collected into monasteries, and sometimes lived by the labour of their own hands.[1]

550 A.D. Spelman's Tithes, VI. 93. Selden, 70

Such being the revenues which the laity was accustomed to give for religious purposes, and such the state of the early Christian Church, we can well imagine in many cases, as the principles of Christianity forced their way, the ecclesiastics found it convenient to accept things as they found them. The result arrived at in the 6th century is graphically described in the *Epist. Gildae*, 547 A.D. :— I. H. & S. 74

"Sacerdotes habet Britannia, sed insipientes; quam plurimos ministros sed impudentes; clericos sed raptores subdolos; pastores, ut dicuntur, sed occisioni animarum lupos paratos, quippe non commoda plebi providentes: sed proprii plenitudinem ventris quaerentes; Ecclesiae domus habentes, sed turpis lucri gratia eas adeuntes; . . . justos inopes immanes quasi angues torvis vultibus conspicantes, et sceleratos divites absque ullo verecundiae respectu sicut coelestes angelos venerantes."

Since this account does not contain any allusion to tithes, such as we might well expect if they were generally paid, it serves as a useful starting-point. Though on the face of it the picture is overdrawn, yet it is sufficiently clear to show that the Church at that time was, speaking generally, both able and not unwilling to further any process of change likely to improve its revenues.

[1] "The priests of the Monastery of Bangor all did ever live by the labour of their own hands."—*Bede* II. 2.

550 A.D. What sort of process was to be expected *à priori* is easily seen. For the rich man who had given more than a tithe, having clerics frequently in his employ, would not be slow to find out that a tithe was what the ecclesiastical law required; while the priest, as soon as more peaceful times enabled him to continue to minister in one locality, would begin to inculcate on the smaller tenants that a tithe at least was due from all. The only check on this operation was the above-mentioned disinclination of the Church to mention anything in the nature of a tax until the temporal power was consolidated; but this check would have but slight effect where the power of the individual ecclesiastical bodies grew so as to enable them to enforce their own exactions. The tendency which we are thus led to look for would further be aided by the organization of the Church at this period. For at this time that was not possible which afterwards is said to have happened—viz., that individual ecclesiastics were so rich that they did not trouble to collect tithes. The clerics did not collect for themselves, but for the benefit of the corporate body to which they belonged. In every case when a district was converted, some central station was established, from which the assembled clergy sallied forth to visit the neighbouring villages and towns, to preach the tidings of salvation, and later on to educate the children of their district. These central stations either were originally or developed into monasteries and cathedrals, and into their coffers were paid all the contributions collected within the parochia or district ministered to by the collective body.

In every such body the governing authority, whether bishop or abbot, would be well aware of the state of ecclesiastical opinion on the Continent from the Synod of Tours in 567 A.D., and the Council of Macon[1] in 585 A.D.

[1] The Canon of the Council of Macon enacts: "Leges Divinae, consulentes Sacerdotibus ac Ministris Ecclesiarum pro haereditaria portione omni populo praeceperunt Decimas fructuum suorum locis sacris praestare, ut nullo labore impediti per res illegitimas, spiritualibus

onwards. It is true that no English bishop was present at this Council, but no long time would pass before news of so interesting a character would be brought home. Moreover, we can well understand that contributions so levied for a common object would be levied on an uniform plan, so that the suitability of that plan would be a matter of great importance, and the considerations which we have pointed out as tending to change voluntary offerings into tithes would operate with so much greater force. 550 A.D.

Starting from these premises, let us now try to follow what actually happened. St. Augustine, at his landing in 596 A.D., would probably have had his attention called to the question of tithes, for he had spent some time in journeying through France, where the Church was beginning then to profit largely from the Council of Macon; and he came from Pope Gregory, who certainly considered payment of tithe a duty, and possibly presided at a Council which decreed it.[1] This being so, St. Augustine's first question and Pope Gregory's answer are carefully to be noted. For although Augustine's question refers to the offerings of the faithful upon the altar—"De his quae fidelium oblationibus accedunt altario"—only, the words in the answer are,[2] "In omni stipendio quod accedit;" and the Bede I. 27

possint vacare Ministeriis; quas leges Christianorum congeries longis temporibus custodivit intemeratas. Unde statuimus ut Decimas Ecclesiasticas omnis populus inferat, quibus Sacerdotes aut in pauperum usum aut in captivorum redemptionem erogatis, suis orationibus pacem populo ac salutem impetrent.—*Selden*, p. 58.

[1] The Concilium Hispalensi; but see *Selden*, p. 61.

[2] The answer was: "It is the custom of the Apostolical See to charge Bishops, when they are ordained, that the whole income be divided into four parts—one for the Bishop and his "family," for hospitality's sake and the entertainment of others; one for the clergy; a third for the poor; the fourth for the repair of churches. But inasmuch as you, my brother, who have been trained in the monastic rules, ought not to be separate from your clergy, you should institute in the English Church the same manner of administration which was in use by our fathers in the very first infancy of the Church, in which no man of them said that aught of the things which he possessed was his own; but they had all things in common."—*Bede* I. 27.

596 A.D. Pope mentions as applicable to them the division into
Lord Selborne, Tithes, 27 four parts, which we know was (at one time) regularly applied to tithes. It is almost as if the Pope had written, Turn the offerings into something more settled if possible; and in this way St. Augustine appears to have understood it, for while the tale of the miracle performed by him at Cometon is to be regarded as a fable for the reasons given by Selden, yet there is no sufficient reason for disbelieving entirely the statement in Sect. 8 of the laws of Edward
Selden, 225 the Confessor to the effect that, "Haec" (viz., laws concern-
Post, p. 33 ing tithes) "praedicavit Sanctus Augustinus et haec concessa sunt a rege et confirmata a baronibus et populis."

Moreover, a passage in St. Augustine is given as an
Selden, 210 authority for a paragraph *De Decimis* contained in the *Statuta Synodorum* in the abbey of St. Augustine, which were written about 900 A.D.

Now the gifts from Ethelbert to the Church were large, and in Kent the diocese was well organised; there is no inherent improbability, therefore, which should lead us to doubt that, with the consent of the King, nobles, and people, the Church did, before the death of St. Augustine, obtain payment of tithe throughout some portion of Kent. But whether this be so or not, the Kentish monasteries and the see of Canterbury had thenceforth a continuous powerful existence, so that it is highly improbable that they should have entirely refrained from so well authorised a mode of collecting revenues. The see of the City of London must also have had a revenue at this time, for in 685 it was bought with money by Wini, Bishop of Win-
Bede III. 7 chester, from Vulfhere, King of the Marshes;[1] and Wini continued there, bishop, to the end of his life.

The only reason for doubting the payment of tithes at this time is the fact that they are not mentioned in the

[1] It was long ago observed by Dugdale that "we are not only without all knowledge when our churches were first founded and endowed, but are very much to seek touching many of their presentations and institutions in times when we are sure that such there were." It is probable that the gifts both of sites and of endowments

charters; but this evidence must necessarily have little weight, since we find that it continues after tithes are known to have been commonly paid. The omission of all mention of them by Bede in the *History* must be disregarded on the same ground. For it is certain that payment of tithe was not unknown before 733 A.D., yet the *History* contains only one mention of them, and that not of a payment to the Church. Throughout the fifty years after the death of St. Augustine, the progress of the Church, both in growth and organisation, was very marked, and there is no reason to doubt that the payment of tithes spread in proportion thereto.[1] 600–700 A.D.

Theodore was appointed to the see of Canterbury in 668, being the first Primate of all England, and in 670 held the Council of Hertford. The articles there determined on show how well settled the Church had become. Thenceforward each monastery would in general only minister to that part of the country where it had already established a footing, while the remainder of each diocese would be worked by the clergy sent out by the Bishop, and returning the offerings to the common chest. Besides these there would be the priests, sometimes monks, sometimes clerics, sometimes neither, appointed, or possibly nominated for the Bishop to present, by the great landowners to minister to their estates, and to receive such payments as they chose to grant. H. & S. III. 120

The sixth article, which prohibits a bishop or cleric from

of parish churches made before the Conquest were usually by word of mouth and symbolical delivery before witnesses, without any written deeds. The general use of charters first came in with the Normans.—*Lord Selborne*, p. 115.

[1] Bede's short collection *De Decimis*, in the *Scintillae*, chap. 29, does not carry the question any further. The strongest passage is that cited from Augustine: "Decimae enim ex debito requirantur et qui eas dare noluerit res alienas invasit."—Bede's *Scintillae*, XXIX. *Selden*, p. 54, doubts this.

All one can say is that it is an extremely short step from that doctrine to the law of excommunication for non-payment. Selden suggests that this is not by St. Augustine, but that is immaterial to Bede's opinion.

734 A.D. executing any office of a priest without the permission of the bishop of the diocese, seems to show that some stipend or reward was already attached to the performance of the priestly offices.

Bede IV. 27 It is to this period (viz. 684 A.D.) that the following description given by Bede belongs: "It was the manner of the people of England at this time, that when any of the clergy or any priest came to a village, they would all by-and-by, at his calling, come together to hear the Word, and willingly hearken to such things as were said, and more willingly follow such things as they could understand." And we can gather that such ministrations were not without profit even in the wildest parts, from the express mention of the economy of the Scotch Church

Bede III. 26 when in Northumbria; and that such profits were growing

H. & S. III. 317–320 appears from the subsequent descriptions in the letter of Bede to Egbert, written A.D. 734, wherein he describes how the priests took tribute in the most remote villages of Northumbria, without doing any Church work therefore. That the money collected was not spent according to the customs of the Primitive Church appears both from the

Bede IV. 29 contrasted practice of the Scots just referred to, and also from the express mention of Ethelbert's alms and charity,[1] in that, according to the old Law, he gave every year to poor folk the tenth not only of his cattle, but of all grain, fruit, and apples, and some part of his clothes and apparel too.

From all this we might safely infer that tithe was in fact paid in some places before the end of the seventh century; but we have indubitable authority at this period (and it is the earliest English indubitable authority extant concerning tithes) as to Archbishop Theodore's views

H. & S. III. 173, etc. II. 8. thereon. For in the *Poenitenetial* which was published with his authority we are told, "Presbitero decimas dare non cogitur," which implies that tithe was in fact exacted,

[1] As is explained by Selden, the old Law here simply means the Mosaic Law, and the passage itself refers only to tithes as a convenient measure for personal charity, and has no connection with any tribute paid to the Church.

at least sometimes, from laymen; and again: "Tributum ecclesiae sit, sicut consuetudo provinciae, id est, ne tantum pauperes inde in decimis aut in aliquibus rebus vim patientur. Decimas non est legitimum dare nisi pauperibus et peregrinis, sive laici suas ad ecclesias." And again: "Si quis xenodochia pauperum administrat vel populi decimas susceperit et exinde vel suis secularibus lucris sectandum aliquid subtraxerit; quasi rerum invasor reus damnum restituat et sub canonico judicio reformetur."[1]

670 A.D. H. & S. XIV. 9, 10

A. L. I. 316

From these extracts it appears that tithes were at that time (Theodore died in 690) collected with the sanction of the Church, and brought into the common fund, apparently throughout a considerable portion of the whole of England. There can be no doubt of the ability of the Church to enforce payment if so disposed—at any rate in Kent, Wessex, and Northumbria. In the last-named, Aldfride reigned from 685–705, and he, according to Bede, like a good prince, had learned to follow and reverence the general ordinances and rules of the Catholic Church. He gave to Wilfrid a lordship of ten tenements in Stanford, and shortly after a monastery of thirty tenements at Ripon. Wilfrid was a man of immense ability, and after his return from Rome with all the prestige of one who had sat in a synod at Pope Agatho's invitation, he would naturally raise the knowledge of ecclesiastical law in the North to the level of that in Kent.

Bede V. 20

What that level was appears from the *Dooms* of Wihtred, King of Kent. These decrees, made 694 A.D., so far as they affect the Church, are—

1. To the Church, freedom in jurisdiction and revenue, and that the King be prayed for and that they revere him of their own will.

2. That the mund byrd[2] of the Church be L. shillings as the King's.

[1] Kemble suggests that this means that the clergy should not make friends among the laity by giving them presents out of the tithe.—*Kemble* II. 503.

[2] "Mund byrd" = price of protection.

690 A.D. While the Privilege contains provisions as to the sanctity of Church property: "Non esse licitum alicui homini in laico habitu constituto usurpare sibi quasi propriam possessionem, quod ante fuerat Domino concessum et crucè Christi firmatum."

A. L. & I., p. 45 In Wessex, four years earlier, 690 A.D., the *Dooms of Ine* were passed at a Witenagamot. The portions which follow are of importance, because they form the first authentic positive enactment in this country concerning Church revenue. They do not form very strong evidence either to prove or disprove the payment of tithe at the time, because Church scot was a payment derived probably from custom, and therefore proper to be dealt with by the Witenagamot, while tithe was, if anything, canonical; but the omission of all mention of the latter, when compared with the laws of Edmund, does possibly tend to throw doubt on its then existence in Wessex.

The sections are—4: "Let Church scots be rendered at Martinmas. If any one do not perform that, let him forfeit XL. shillings, and render the Church scot twelvefold." And 61: "Church scot shall be rendered according to the healm and to the hearth that the man is at at midwinter."

Hence, looking at the state of things before 700 A.D., we have these data:—

1. Tithe was in fact collected, and the collection was of so formal a character that rules were needed for the application of the result.

2. In Kent, at any rate, if not elsewhere, a strict legal foundation had been given to the jurisdiction of the Church, so that the canonical law then formed part of the law of the land. The canonical law at that time enjoined payment of tithe.

Hence we know that tithe was collected, and that the Church, at least in Kent, could, had it chosen, have had a well founded jurisdiction to enforce such collection by the infliction of those penalties which were in her own power. There is one piece of evidence as to this period

which shall be given, because it includes Mercia. Boniface, who believed that tithe was paid to the Church in England (for in his letter to Cuthbert he writes: "Lac et lanas ovium Christi oblationibus cotidianis ac decimis fidelium suscipiunt"), writes to Ethelbald, King of Mercia, 744 A.D.: "Postquam sanctus Gregorius gentem Anglorum convertit, privilegia ecclesiarum in regno Anglorum intemerata et inviolata permanserunt usque ad tempora Ceolridi Regis Merciorum et Osredi Regis Derorum et Berniciorum." 740 A.D. H. & S. III. 354–5

Now Boniface was an Englishman, and had ample information concerning the Church in England at this time; hence the fair inference seems to be that he assumed that tithe was paid, and that if the Church had tried to exact it, no material interference had occurred. In 716, at a Council of Clovesho, the privilege of Wihtred was confirmed; and this confirmation was repeated at a council held there in 742, with the addition that Ethelbald, King of Mercia, decreed:

"Ut per omnia libertas honor auctoritas et securitas Christi Ecclesiae a nulla persona denegetur sed sit libera ab omnibus secularibus servitiis et omnes terrae ad illam pertinentes exceptis expeditione pontis et arcis constructione."

And this addition again was confirmed by Ethelbald and a Witenagamot. Yet nowhere in these Canons is tithe mentioned.

Perhaps we may not be far wrong in believing that the Church preferred to leave them to be paid, as Theodore had it, "Sicut consuetudo provinciae," since any general canon, of which the equitable enforcement might have been regarded as a duty, would probably have led to an ill-timed conflict with the great nobles.

However this may be, under other rulers the Church seems soon to have regained the courage of its opinions. In 786, the Papal legates, George and Theophylact, succeeded in getting the assent of Aelfwold King of Northumbria, Offa, King of Mercia, the two Archbishops and H. & S. III. 447

786 A.D. bishops, and barons representing almost all parts of England, to the decrees[1] submitted to them. Kenwulf, King of Wessex, also appears to have assented to the calling together of the Southern Council, so that both powers of the State throughout nearly the whole of England may be considered to have assented to the decrees.

The seventeenth Article is:—"Of giving tithes, as it is written in the Law, 'Thou shalt bring the tenth part of all thy crops or first-fruits into the house of the Lord thy God.' Again, by the prophet, 'Bring' (he says) 'all the tithes into My barn, that there may be meat in Mine house; and prove Me now herewith, if I will not open unto you the windows (cataractas) of heaven, and pour you out a blessing, even to abundance; and I will rebuke the devourer for your sakes, who eateth and spoileth the fruit of your ground, and your vineyard shall no more be barren in the field, saith the Lord.' As saith the wise man: 'No man can give a true alms of that which he possesseth, unless he hath first separated to the Lord what He from the beginning has appointed for man to render Him.' And through this it commonly happens that he who does not give a tenth is himself reduced to a tenth. Wherefore also we solemnly lay upon you this precept, that all be careful to give tithes of all that they possess, because that is the special part of the Lord God; and let a man live on the nine parts, and give alms, and we advised that this should rather be done secretly, because it is written, 'When thou doest thine alms, do not sound a trumpet before thee.'"

Henceforward it was law, though possibly the Church found it politic not always to enforce it, that each one should give tithes of all he possessed.

[1] Lord Selborne points out that these decrees were not legislative enactments by kings and witenagemots. (*On Tithes*, p. 167.) Nevertheless they were probably quite as effective as if they had been formally passed. For we cannot doubt that henceforth the Church was entitled to enforce payment by means of her own sanctions, and it was not until very much later that it became customary to use temporal assistance for that purpose.

There remain to be shown (I.) to whom the tithe was to be given, and (II.) how payment was to be enforced. 786 A.D.

(I.) To whom was tithe to be paid? Division of the country into parishes had not yet taken place. Parochia still meant a division, or perhaps sometimes the territory appertaining to a monastery. Still the rule was payment into a common fund, although the old system had so far changed that the clergy in many instances remained in a particular district, whilst in some cases probably the monasteries had already appointed vicars. In addition to these there were the priests appointed by the great landowners to churches built by them, or retained by rich men for the education of their children. These would be paid by salary, or by a grant of land, or by tithe; but it is probable the two former methods would be replaced by the last-mentioned as soon as the great man saw a legal way of making his tenants pay what he had formerly paid himself. One class more existed, which was formed by those who, owing to distance or other reasons, had broken off all connection with their Bishop or monastery, and had continued to minister in one place, possessing in return the glebe, or perhaps the tithe, without accounting therefore. Kemble suggests that it was a common occurrence for a missionary to settle himself in the religious establishment which in all likelihood was found attached to every mark. It is probable that this was so in portions of the country which were comparatively inaccessible; but the very fact suggested, that a revenue was attached to such a religious establishment, would prevent such an occurrence so long as the missionary was under the eyes of the body from which he set out. Larking again suggests that the prebendaries appear to have held separate prebends, and to have bequeathed them to their sons. It may be also that it was customary for the corporate body to appoint the son vicar on the death of the father.

It has indeed been asserted that Theodore established parishes with glebe and tithes in forms which would have differed little from those now existing. The origin of the

786 A.D. mistake is seen in Kemble; for he translates the 38th chapter of the *Capitata Theodori*, "Quicunque presbyter ecclesiam per pretium adeptus fuerit," into "Any presbyter who shall have obtained a parish by means of a price." It is a *petitio princ.* to assume that ecclesia had that meaning at that time. We may with more confidence agree with Carte that "this prelate made a greater improvement than had ever been made before his time in the English churches, by putting men of quality and fortune, upon building churches, in cities and towns, to which he allotted certain districts" (generally of the same extent as the founder's estate); "and that when these estates were so large that one place of worship was not sufficient for all the tenants, this gave occasion, in some instances, as the division of manors and the alienation of lands did in others, to the erection of chapels of ease;" and afterwards in some cases liberty was granted to the Lords to assign a third part of the tithes to those that ministered therein, or even the chapel might be given the right of sepulture, and so become completely separated.

In addition to these there were probably, in fact, proprietors who were laymen in that they belonged to no ecclesiastical body, and did not perform any ecclesiastical duties; but as they pretended to a clerical office for the sake of enforcing payments, they do not differ in legal character from clerics.

Disputes as to the right to tithe therefore might arise between any two of these classes: (1) the diocese, (2) monasteries, (3) representatives of the landowners, (4) vicars perpetual or hereditary rectors. Obviously ecclesiastical courts would be ill-fitted to determine most of such disputes, and we find[1] that disputes as to boundaries were usually determined by the lay court from very early times.

[1] Thus in 1110 A.D., the dispute between Urban, Bishop of Llandaff, and Wilfrid, Bishop of St. Davids, as to their boundaries, was decided in the first instance by a jury.—*I. H. & S.* 303.

(II.) Four ways of enforcing payment were in vogue.[1] 786 A.D.

(*a*) The person entitled might take the tithe himself. This would probably be the course pursued by the nominees of the great landowners.

(*β*) or something in the nature of a fine might be inflicted for non-payment.

(*γ*) or the defaulter might be refused admission to the Church and its rites.

(*δ*) or might be excommunicated.

Probably the last two methods were always sufficient to enable the Church Courts to retain jurisdiction to enforce payment of tithes even against tenants of laymen.

That this jurisdiction was anomalous appears from the Welsh laws following Howel Dda. "If a man of a church sue a man of a Court let him sue in the Court. H. & S. I. 650

4. However, there have been seven precedences established for the Church as the chief against the court: those seven are tithe offering, daered, communion of the dead, altar spoil, sarad to a graduate, open violence to a clergyman."

But that the Church had little difficulty in supporting it, although anomalous, we can well believe, when we consider how much power the Church wielded in the County Courts before the Conquest.

In short we have in 786 A.D. arrived at a stage when the Church, emboldened by its growing power and wealth, has ventured to obtain an enactment of that which it had long taught to be right, and is possessed of a jurisdiction and machinery amply sufficient to enforce that enactment against all except the Kings and the greatest of their Barons.

[1] In France in 830 A.D. payment might be enforced (1) by admonition; (2) by exclusion from the Church; (3) by the intervention of the civil power and the infliction of fines; (4) by a sort of interdict against defaulters' houses; (5) by taking the defaulters into custody and bringing them before the Imperial or Royal Courts.—*Lord Selborne's Tithes*, p. 54.

CHAPTER II.

LAWS, CANONS, ETC., FROM THE LEGATINE SYNOD OF 786 TO MAGNA CHARTA.

816 A.D. SUCH was the first establishment of the law of tithes in England. We may notice that it is almost simultaneous with the change made by Charles the Great in France, where in 779 A.D. the religious duty which had been more or less enforced by ecclesiastical law for two centuries, was made generally and legally imperative by the decree: "Concerning tithes it is ordained that every man give his tithe and that they be dispensed according to the bishop's command." Henceforth the variations of the law require attention, and of those variations the chief concern the person to whom payment was to be made, while the variations in the mode and amount and in the method of enforcing payment are less important; but as these changes were effected gradually at periods which are not easily defined, we will, before considering them, review in historical order the actual enactments and ordinances in the ensuing period. Of enactments directly affecting tithes there is not one for a long time.[1]

At the Council of Clovesho in 803 Ethelheard and the

[1] It would perhaps be rash to infer from the Council of Celchyth that their imposition was already enforced throughout the Anglo-Saxon Kingdoms, and it most vexatiously happens that after the Council every vestige of their existence disappears. Not a single notice of tithes is to be found in the history of the next 120 years till after the death of Alfred, when it presents itself to us as an institution long since recognised by law, sanctioned with pains and penalties, and evaded or resisted by many when evasion or resistance could be attempted with the prospect of impunity.—*Lingard*, I. 184.

Synod under command from Pope Leo enacted that thence- 816 A.D.
forth none should dare to choose themselves lords over
God's heritage from laymen or seculars. This probably III. H. & S.
put an end at once to the power of Court favourites to found [545]
monasteries for the sake of gain.

In 816, at Celchyth, the Council of the Province of III. H. & S.
Canterbury, in the presence of Kenwulf, King of Mercia, [582]
and his barons, enacted (*inter alia*)—

(7). That neither bishops nor abbots should sell any Church property.

(8). That things dedicated to God should so remain for ever except in cases of necessity.

(10). That as often as any bishop should depart this life, then we enjoin the distribution of the tenth part of his substance, of whatever it consists, among the poor for the benefit of his soul—whether flocks or herds, or sheep and swine, or even what he has in the cellars . . . . and at once in every diocese and in all the churches (per singulas parochias singulis quibusque ecclesiis) the whole company of God's servants shall assemble at the sound of a bell in the church, and then altogether sing thirty psalms for the soul of the dead.

(11). "Ut nulli episcoporum liceat alterius parrochiam invadere sed et alii sui proprii sint contenti. . . . Et presbyteriis praecipimus ut nullus majorem negotiam ad se desiderat quam a proprio Episcopo concedatur nisi in solo baptismo et aegritudine infirmorum tantum."

Whence we may infer that parishes with fixed boundaries Post p. 74
were still far from being the universal rule, and that the See Selden,
reference to singulas parochias in Section X. does not refer [257]
to parishes in the modern sense.

The provision in Section X. for distribution of a tenth shows that the heads of the Church at least were now prepared to support by example the duty which they preached.

How firmly the theory was established that a tenth was the proper proportion to give was furthur shown some thirty to forty years later by Ethelwolf's noble benefactions.

844 A.D. As we have already arrived at the conclusion that payment of tithe was before 844 an existent fact, we are the more ready to accept Kemble's version of what these grants really were. According to Kemble[1]:

Kemble II. 489 "Ethelwulf did three distinct things at different times: he first released from all payments except the inevitable three a tenth part of the folc lands or unenfranchised lands, whether in the tenancy of the Church or of his thanes. In this tenth part of the lands so burthened in his favour he annihilated the royal rights regnum or imperium, and as the lands receiving this privilege were secured by charter, the Chronicle can justly say that the King booked them to the honour of God. A second thing he did (854 A.D.) inasmuch as he gave a tenth part of his own private estates of bookland to various thanes or clerical establishments, and lastly (857 A.D.) upon every ten hides of his own land he commanded that one poor man, whether native born or stranger—that is whether of Wessex or some other kingdom—should be maintained in food and clothing. It is unnecessary to waste words in showing how utterly different all this really is from any grant of tithe, and how entirely unfounded is the opinion that Ethelwulf made the first legal enactment in behalf of tithe in this country."

Selden, 205 The Bishops appear to have regarded the grant in the light of a valuable example, since, as Ingulphus writes, they received it and sent it to be published in every parish church through their dioceses; and, indeed, it is from this that the importance of the matter arises. We have seen that tithes had been in fact widely collected, and probably often exacted, yet prior to 786, we have met with no general enactment in their favour. The reason which suggests itself, viz., that any general enactment would have included the property of the Kings and Barons, and so might have aroused an inconvenient contest, is rendered the more plausible by the express mention of ealdormen

[1] So Ricardus de Cirincastria makes King Edgar say: Proavus meus ut scitis omnem terram suam Ecclesiis et monasteriis decimavit.—*Ric. de Cir.* II. 114.

and bishops as liable to tithe in the preamble to the ordinance of Athelstan to which we shall shortly come. 850 A.D.

If these arguments from expediency really were the considerations which influenced the Church in refraining so long from any positive enactment (and the fact that the first enactment was ultimately passed under the direction of the Papal legates points to the same conclusion), then we can well believe that the open acceptance by King Ethelwulf of the principle as binding on his conscience was an event the importance of which to the Church it is impossible to over estimate.

It is now generally admitted[1] that Selden's view of Aethelwulf's donation was incorrect. One reason which I have not seen mentioned seems sufficient to discredit it. Tithe being spiritual never was so far as we know subject to any services whatever,[2] and if this be so, it is impossible to explain the grants in the way attempted by Selden. On the whole we may regard the grants themselves as sufficiently described in the rhyme quoted by Selden from Robert of Gloucester: H. & S. III. 637

> "The King to holye Church thereafter ever the more drough
> And tithed well all his land as he ought well enough." Selden, 206

And if the story which Selden has from Polydor, that Offa gave the tithe of his estate to the clergy and the pastor be true, then that fact is of similar importance to our subject in that it also encouraged the Church to enforce her rights against rich and poor equally. There is no reason to doubt that under the three eldest sons of Ethelwulf these rights were asserted wherever the condition of the country permitted, and certainly during the first portion of Alfred's reign such assertion had every prospect of succeeding.

In the Dooms, Alfred himself says, section 38: "Thy A. L. & I. 24

[1] If any doubt remained it has been finally dispelled by the careful collation of the passages from the Chronicles by Lord Selborne.—*On Tithes*, 187.

[2] Nullus pro decimis quae sunt spirituales de aliqua reparatione pontis seu aliquibus oneribus temporalibus onerari debet.—II. *Inst.* p. 641.

880 A.D. tythes and thy first fruits of moving and growing things," "render thou to God;" and amongst the Dooms which
A. L. & I. p. 73 "King Alfred and King Guthrum chose" and Edward and Guthrum afterwards ordained the sixth is: "If any one withhold tithes, let him pay lahslit[1] among the Danes, wite among the English. If any one withhold Romefeoh"[2] (the same). "If any one discharge not light scot" (the same). "If any one give not ploughalms"[3] (the same) "If any one deny any divine dues" (the same) "and if he fight and wound anyone, let him be liable in his wēr. If he fell a man to death, let him then be an outlaw, and let every of those seize him with hearm who desire right. And, if he so do that any one kill him for that he resisted God's law or the King's, if that be proved true let him lie uncompensated."

Hence we see that Alfred and his son thought the right of the Church to its revenues including tithe a sufficiently important part of the law to form a part of this treaty with the Danes, by whom indeed it was probably strenu-
Selden, 105 ously objected to, if that be true which Selden mentions that they as a nation were exceptionally averse to payment of tithe. The remedy provided was eminently suitable to the state of the country, and probably materially assisted the Church in enforcing her rights, since the Danes might, when war was imminent, have treated the threat of excommunication with contempt.

Perhaps the strongest evidence to show[4] that tithe was now regarded as an essential part of the rights of the Church, not depending on any enactment or gift, is the publication by Aethelstane at the Council of Greatanlea of elaborate directions for payment of it, not as an enacting part of the ordinance, but as a preamble.

[1] Lahslit and wite were probably equal.

[2] Romefeoh paid by those who had live stock worth thirty shillings, for the English School at Rome.—*Thorpe A. L. & I.*

[3] Ploughalms—a penny on every plough.

[4] Lord Selborne points out that the fact that tithes were matter of ecclesiastical jurisdiction proves that they were not a gift from the State.—*Lord Selborne*, p. 127.

"I, Athelstane, King," it runs, "with the counsel of Wulfhelm, Archbishop, and of my other bishops, make known to the reeves at each burh, and beseech you in God's name, and by all his saints, and also by my friendship, that ye first of my own goods render the tithes both of live stock, and of the year's earthly fruits, so as they may most rightly be either meted or told or weighed out; and let the bishops then do the like from their own goods and my ealdormen and my reeves the same. And I will that the bishop and the reeves command it to all those who ought to obey them that it be done at the right term. Let us bear in mind how Jacob the Patriarch spake.—Decimas et hosteas pacificas offeram tibi: And how Moses spake in God's law.—Decimas et primitias non tardabis offerre Domino. It is for us to think how awfully it is declared in the books if we will not render the tithes to God, that he will take from us the nine parts when we least expect, and moreover we have the sin in addition thereto. And I will also that my reeves so do, that there be given the church scots and the soul scots at the places to which they rightly belong; and plough alms yearly on this condition that they shall enjoy it at the holy places who are willing to serve their churches and of God and me are willing to deserve it: but let him who will not, forfeit the bounty or again turn to right. Now ye hear, saith the King, what I give to God, and what ye ought to fulfil by my offerhirnes."[1] 924 A.D. A. L. & I. 83–84

And this was thankfully acknowledged by the Church at the next Council thus:

"Karissime; Episcopi tui de Kent, et Thayni, Comites et villani tibi Domino dulcissimo suo gratias agunt, quod nobis de pace nostra praecipere voluisti, et de commodo nostro perquirere et consulere; quia magnum opus est inde nobis divitibus et egenis. Et hoc incepimus, quanta diligentia potuimus, consilio horum sapientum quos ad nos misisti. Unde Karissime Domine, primum est de nostra Decima, ad quam valde cupidi sumus A. L. & I. 91 Selden, 215

[1] Offerhirnes—penalty for contempt.

944 A.D. et voluntarii et tibi supplices gratias agimus admonitionis tuae."

That the Church did not rest her rights at this time on any enactment or gift, nor use the above law of Edward and Guthrum except against the Danes, is perhaps also to be gathered from the ensuing institute published at the Synod held by Edmund with the Archbishops and Bishops.

940–946 A.D. A. L. & I. 104 "A tithe we enjoin to every Christian man by his Christendom and Church Scot and Romefeoh and plough alms. And if any one will not do so let him be excommunicated."

So too, Odo, the Archbishop of Canterbury, in his constitution probably made at a subsequent Council, adopts the language of the Legatine Synod of 786.

Selden, p. 217. "Capitulo mandamus et fideliter obsecramus de Decimis dandis sicut in lege scriptum est. Decimam partem omnibus frugibus tuis seu primitiis deferas in domum Domini Dei tui. . . . Unde et cum obtestatione praecipimus ut omnes studeant de omnibus quae possident dare Decimas; quia speciale Domini Dei est, et de novem partibus sibi vivant et eleemosynas tribuant."

And again, at a Council at London held in 944 under Odo and King Edmund, the second title is—

Wilkins I. 214 "Decimas injungimus singulis christianis per christianismum eorum et ecclesiae censum et nummum eleemosynarum. Siquis hoc facere nolit sit excommunicatus."

About the year 970 King Edgar, with the advice of his witan, ordained

A. L. & I. p. 111 1. "That God's churches be entitled to every right; and that every tithe be rendered to the old minster[1] to which the district belongs; and that be then so paid both from a thane's inland and from geneat land so as the plough traverses it."

2. of Church Scots

But if there be any thane who on his boc land has a church at which there is a burial place, let him give the

[1] Mynster—Monasterium, a minster, monastery.—*Thorpe, A. L. & I.*

third part of his own tithe to his church. If any one have a church[1] at which there is not a burial place, then of the nine parts let him give to his priest what he will; and let every church scot go to the old minster according to every free hearth; and let plough alms be paid when it shall be fifteen days over Easter.[2] 970 A.D.

3. of Tithes

"And let a tithe of every young be paid by Pentecost and of the fruits of the earth by the equinox and every Church scot by Martinmas on peril of the full wite which the doom book specifies. And if any one will not then pay the tithe as we have ordained, let the King's reeve go thereto, and the bishops and the mass priest of the minster, and take by force a tenth part for the minster to which it is due; and assign to him the ninth part, and let the eight parts be divided into two, and let the landlord take possession of half, half the Bishop, be it a King's man, be it a thane's."

And of the Canons also published under King Edgar, the 50th is:

"And we enjoin that priests in ecclesiastical ministries all be on an equality, and in a years space be like worthy in all ecclesiastical ministries." A. L. & I. 400

"And we enjoin that the priest do remind people of what they ought to do to God for dues in tithes and in other things. First plough alms 15 days after Easter, and a tithe of young by Pentecost and of earth fruits by All Saints and Romfeoh by St. Peter's mass and Church scot by Martinmass."

Edgar's motives for passing the ordinance itself (under the influence of Dunstan, Ethelwold, and Oswald) were probably not dissimilar to those which he subsequently

[1] *Cf. Dimetian Code of Howel Dda*, A.D. 928.—If a church be built by permission of the King within a taeog trev, and there be a priest offering mass in it and it be a burying place, such a trev is to be free thenceforward. I. H. & S. 247

[2] There are many proofs in domesday that these provisions of Edgar's Law both with respect to the old Minster and the Field churches had been then carried into execution.—*Lingard* I. 187.

970 A.D. avows in his proclamation[1] ordering obedience to it. From this proclamation we can gather the position which the Church at this time, and probably throughout, held. It is the duty of every man to voluntarily pay tithes of all he possesses to God's use, and the Church will see that he does so. The Church has ample means to compel payment, but payment under compulsion is useless in averting God's anger. So in the case of the community; it is for the community as a whole to voluntarily pay tithe, and for this purpose to bind its individual members. Then the Church, in enforcing tithe, could say that *qua* the individual indeed it was a compulsory, but *qua* the community a voluntary payment; and thus it would appear that the ordinances were purely for the good of the laity, and not sought, but recommended by the Church.

The next ordinance which we have to notice was passed under Ethelred by the ecclesiastical council and lay witan, wherein the 11th section runs:

Liber Constitutionum A. L. & I. p. 131.

"And let God's dues be willingly paid every year; that is plough alms 15 days after Easter, and a tithe of young by Pentecost and of earth fruits by Allhallows mass

[1] Here is manifested how Edgar the King was deliberating what might be for bot in the pestilence which much afflicted and decreased his people widely throughout his dominion. First then it seemed to him and his witan that a misfortune of such kind had been merited by sins, and by contempt of God's commandments and most of all by the diminution of the need-gafol that Christian men ought to render to God in their tithing scots. He thought on and considered the divine according to worldly usage. If any geneat man neglect his Lord's tribute and do not render it to him at the right term, it may be expected if the lord be merciful that he will grant forgiveness of the neglect, and accept his tribute without a penalty. But if he by his messengers frequently remind him of his tribute, and he then be obdurate and think to resist it, it is to be expected that the lord's anger will so greatly increase that he will neither grant him property nor life. Thus it is to be expected that our Lord will do, through the audacity with which people have resisted the frequent admonitions that our teachers have made respecting the need-gafol of our Lord, that is our tithes and Church scots. Thus I and the Archbishops command that ye anger not God, nor merit either the sudden death of this present life nor still more the future one of eternal hell by any dimi-

and Rome feoh by St. Peter's mass and light scot thrice in the year." 1009 A.D.

And in the same reign at the council held at Enham, about 1009, it was decreed in an ordinance of the witan:

15. "Let no man henceforth reduce a Church to servitude, nor unlawfully make Church mongering, nor turn out a Church minister without the Bishop's counsel." A. L. & I., p. 136

16. "And let God's dues be lawfully and willingly paid every year, that is plough alms at least 15 days after Easter."

17. "And a tithe of young by Pentecost and of earth's fruits by Allhallows mass."

18. "And Rome feoh by St. Peter's mass, and Church scot by Martinmass."

19. "And light scot thrice in the year."

20. "And it is most proper that soul scot be always paid at the open grave."

21. "And if any corpse be laid out of its proper district elsewhere, then let the soul scot be nevertheless paid to the minster to which it belonged, and let all God's dues be willingly furthered as is needful."

While in the Synodal decrees of the same council:

"Nec ecclesiae antiquitus constitutae decimis vel aliis

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nution of God's dues; but that both rich and poor, who have any tilth render to God his tithes with all joyfulness and without grudge as the ordinance teaches that my witan ordained at Andover and now again confirmed with their weds at Wihtbordesstan. Then I command my reeves by my friendship and by all which they possess that they punish every of those who will not render this and shall break the wed of the witan, by any remissness according as the aforesaid ordinance teaches, and of the punishment be there no forgiveness. If he be so poor that he do the one or the other; either that he diminish the things of God to the perdition of his soul or with anger of mind more remissly treat them, than that which he counteth to himself as his own; then is that much more his own which ever lasts him to eternity if he would do it without grudge and with perfect gladness. Then will I that these Gods dues stand everywhere alike in my dominions, and that the servants of God who receive the moneys which we give to God live a pure life, that through their purity they may intercede for us with God.—*Edgar's Proclamation, A. L. & I.*, p. 114.

1012 A.D. possessionibus priventur ita ut novis oratoriis tribuantur Decimationes frugum et vitulorum et Agnorum necnon et Aratrales Elymosynae Ecclesiastaque munera Domino per singulos annos, temporibus repudantur congruis."

Probably some three years later the same King Ethelred (ready enough apparently to do his best for the Church): "Et sapientes ejus apud Habam instituerunt."

A. L. & I. 144

1. "De Denario sanctae ecclesiae dando et decimatione thaynorum. . . . Ut detur de omni caruca denarius vel denarium valens et omnis qui familiam habet efficiet ut omnis hirmannus[1] suus det unum denarium: quod si non habeat det dominus ejus pro eo et omnis thaynus decimet totum quicquid habet."

4. "Et praecipimus ut omnis homo super dilectionem Dei et omnium sanctorum det cyrisceattum et rectam decimam suam, sicut in diebus antecessorum nostrorum stetit quando melius stetit; hoc est sicut aratrum peragrabit decimam acram. Et omnis consuetudo reddatur ad matrem nostram ecclesiam cui adjacet. Et nemo auferat Deo quod ad Deum pertinet et praecessores nostri concesserunt."

And in the Law of Church[2] grith Aethelred with the counsel of his witan enacts:

A. L. & I. 146

6. "Respecting tithes, the King and his witan have

[1] Hirmannus—a man belonging to the hired or family, a retainer. *Thorpe.* Hirmannus—the Priest's hirman was what we call a parishioner.—*Johnson.*

Soames' Anglo-Saxon Church, p. 184, note.

[2] The authenticity of the Law of Church grith:—Soames says: "That it appeared originally in the Leges Angl. Saxon of Wilkins in 1721. As it was not in the Concilia he is thought to have considered it spurious. The late Mr. Price was of that opinion, and pronounced it from internal evidence an unauthorised assemblage of points of Canon Law. Mr. Hale observes it very ill agrees with a law of Edmund, and if it ever was a law, it was, as respects the duty of repairing churches, virtually set aside and repealed within twenty years by a law of Cnut; so that after all the whole amount of evidence in favour of a legal division of Tithes is this that for twenty years that division was recognised by an Anglo Saxon Law."

Lord Selborne says: "As for the alleged constitutions of King Ethelred they have no satisfactory authentication. Mr. Thorpe supposed them to have been made in the year of that King's restoration

chosen and decreed as is just that one-third part of the tithe which belongs to the Church go to the reparation of the Church, and a second part to the servants of God, the third to God's poor and to needy ones in thraldom." 1014 A.D.

7. "And be it known to every Christian man that he pay to his Lord his tithe justly always as the plough traverses the tenth field on peril of God's mercy, and of the full wite which King Edgar decreed that is:

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after his temporary dispossession by Sweyn, two years before his death, and it is clear from internal evidence that they could not have been earlier. Their ecclesiastical origin is evident; there is nothing to show that they were ever acted upon, and the portion of them material to the present question has no counterpart in any later (or earlier) Anglo Saxon or Danish laws upon the same subject. It would be too long a digression to say more about these documents; they constitute the whole and sole evidence in support of the opinion that either a fourfold or a threefold division of Tithes was ever the law or custom of this Kingdom or any part of it. Well might Mr. Soames say: To build arguments affecting the characters of past clergymen and the interests of present upon obscure complications (*sic*) by unknown authors is hardly reasonable." In the manuscript, Nero A.I. in the Cottonian collection, the Law of Church grith follows immediately after the law of grith and of mund, the first few lines being on the same page and the next fifty lines on the next leaf. Then follow two blank leaves. To the first sixty lines thus separated the objections raised by Mr. Price do not apply. This portion so far as the MS. shows is of equal authority with the preceding law of grith and of mund. In the Cottonian catalogue the law is referred to as Nero A.I. 18. de pace ecclesiae, A.D. 1014, uti notatur manu J. Joscelini; calce mutila est haec constitutio. Seeing that Mr. Thorpe appears to have thought it genuine and has inserted it in the Ancient Laws and Institutes, I believe that it is safer to trust to his opinion than to that of authorities however great who are confessedly advocates of a cause. It is well also to compare Lord Selborne's statement with that of Lingard. "The doctrine of the Anglo Saxon Church was substantially the same as that of the Churches on the continent, and not a single national document has come down to us in which the right of the poor to a considerable portion of the tithe is not distinctly recognised." In his more recent book on Tithes Lord Selborne carefully analyses this question, and again comes to the conclusion that the document was of ecclesiastical origin and was not acted upon. If this be so, the document is still some evidence of what the ecclesiastical authorities desired.

Selden, 82

Lingard, I. 183

1014 A.D. 8. "If any one will not justly pay the tithe then let the King's reeve go and the mass priest of the minster, or of the landrica and the bishops reeve and take forcibly the tenth part for the minster to which it is due, and assign to him the ninth part, and let the eighth part be divided into two, and let the landlord take possession of half, half the bishop; be it a King's man, be it a thane's."

9. "And let every tithe of young be paid by Pentecost on pain of the wite; and of earth's fruits by the equinox, or at all events by Allhallows mass."

10. "And let Romfeoh be paid every year by St. Peter's mass and let him who will not pay it give in addition XXX. pence and to the King pay CXX. shillings." [1]

11. "And let Church scot be paid by Martinmass and let him who does not pay it indemnify it with twelvefold and CXX. shillings to the King."

12. "Plough alms, it is fitting that they be paid on pain of the wite, every year when 15 days are passed after Eastertide and let light scots be paid at Candlemas let him do it oftener who will."

13. "And it is most proper that soul scot be always paid at the open grave."

14. "And let all God's dues be furthered diligently as is needful."

15. "And if any one refuse that, let him be compelled to what is right by secular correction: and let that be in common to Christ and to the King as it formerly was."

To the same reign perhaps belongs the Liber legum Ecclesiasticum,[2] which Wilkins attributes to the year 994 A.D. These canons appear to have been written by

Wilkins, I. 265

[1] It is noticeable that this penalty of one hundred and twenty shillings Saxon is equal to the penalty of fifty shillings in the law of Henry I.

[2] XIV. Non suadeat aliquis presbyter aliquem de alterius ecclesiae auditoribus ad suam ecclesiam neque alterius parrochiæ doceat, ut suam ecclesiam frequentet et ipsi decimas suas det, et eos corrigat, qui aliis illas dare deberent.—*Liber legum Ecclesiasticum*, Wilkins, I. 265.

Aelfric at the request of a bishop named Wulfsin being put in the form of a charge to his clergy. Probably, Wulfsin is to be identified with a Bishop of Sherborne of that name in the reign of Ethelred. Aelfric seems to have wished Wulfsin to promulgate these canons for his own diocese, but there is no evidence that he ever did so. Still we are entitled to treat them as evidence of what was in the mind of Aelfric, which would probably not be contrary to the then state of affairs. 1020 A.D.

Before passing on beyond the flight of Ethelred in 1016, we ought, since Ethelred's writ did not run in the North, to notice the law of the Northumbrian priests, supposed to have been passed about 980, by the 60th, section whereof it is ordained:

"If any one withhold his tithes and he be a King's thane, let him pay X. half marks, a landowner VI. half-marks, a ceorl XII. ores." A. L. & I. p. 420

In the ordinance which King Cnut decreed about 1020, as King of all England, and King of the Danes and Norwegians with the counsel of his witan at Winchester,[1]

[1] Section 8. De Decimis dandis: "And let God's dues be lawfully and willingly paid every year: that is, plough alms at least by 15 days after Easter and a tithe of young by Pentecost and of earth's fruits by Allhallows mass; and if then any one will not pay the tithe as we have decreed: that is, the tenth acre so as the plough traverses it: then let the King's reeve go and the bishops and the landricas and the mass priest of the minster, and take forcibly the tenth part for the minster to which it is due and assign to him the ninth part; and let the eight parts be divided into two, and let the landlord take possession of half, half the bishop, be he a king's man be he a thane's."

9. "And Rom feoh by St. Peter's mass and whoever withholds it over that day let him pay the penny to the bishop and XXX. pence thereto and to the King CXX. shillings."

10. "And Church scot at Martinmass; and whoever withholds it over that day, let him pay it to the bishop and indemnify him XI. fold and to the King CXX. shillings."

11. "But if there be any thane who has a Church on his boc land at which there is a burial place let him give the third part of his own tithe to his Church. And if any one have a Church at which there is no burial place, let him do for his priest what he will from the

1020 A.D. we have almost a codification of the antecedent laws as to tithe. And from Knut's letter to the two Archbishops, written as he departed homeward from Rome in 1031, we learn how anxious he was that the law should be enforced.

Selden, 278 "Nunc igitur," it runs, "obtestor omnes Episcopos meos et regni mei praepositos per fidem quam mihi debetis et Deo quatenus faciatis ut antequam in Angliam veniam, omnium debita quae secundum legem antiquam debemus, sint persoluta, scilicet eleemosyna pro aratris et Decimae animalium ipso anno procreatorum et denarii quos Romam ad sanctum Petrum debetis sive ex urbibus sive ex villis et mediante Augusto Decimae frugum et in festivitate S. Martini primitiae seminum ad Ecclesiam sub cujus Parochia quisque degit quae Anglice Curoscet nominatur. Haec et alia si cum venero non erunt persoluta, regia exactione secundum leges in quem culpa cadit districte absque venia comparabit," and the monk that relates it adds, "nec dicto deterius fuit factum."

But in spite of this the laws of Edward the Confessor, if indeed these laws really belong to so early a date, show that what through coldness of devotion, what through the neglect of demanding tithes by the clergy that were otherwise grown very rich in real endowments, the practice of payment of them was much diminished. Of these laws, confirmed by William after the Conquest and possibly in part to be attributed to him, the seventh title De Decimis is: "De omni annona decima garba Deo debita est et ideo reddenda. Et si quis gregem equarum habuerit, pullum reddat Decimum. Qui unam vel duas habuerit, de singulis

Selden, 225 A. L. & I. 191

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nine parts. And let every church scot go to the old minster according to every free hearth."

12. "And light scot thrice in the year; first on Easter eve a half-penny worth of wax for every hide; and again on Allhallows mass as much, and again on the purification of St. Mary the like."

13. "And it is most proper that soul scot be always paid at the open grave: and if any corpse be laid out of its proper shrift district elsewhere let soul scot be nevertheless paid to the minster to which it belonged."—Cnut's Law, A. L. & I., 156.

pullis singulos denarios. Similiter qui vaccas plures habuerit, Decimum vitulum. Qui unam vel duas, de vitulis singulis obolos singulos. Et qui caseum fecerit, det Deo Decimum. Si vero non fecerit lac decima die, similiter agnum Decimum, vellus Decimum, caseum Decimum, butyrum Decimum, porcellum Decimum. De Apibus vero similiter Decima commodi. Quin et de bosco, de prato et aquis et molendinis, parcis, vivariis, piscariis, virgultis et hortis, et negotiationibus et omnibus rebus quas dederit Dominus. Decima pars ei reddenda est, qui novem partes simul cum Decima largitur. Qui eam detinuerit per justitiam Episcopi et Regis (si necesse fuerit) ad redditionem cogatur. Haec enim praedicavit B. Augustinus et concessa sunt a Rege, Baronibus et populo: sed postea instigante diabolo ea plures detinuerunt; et sacerdotes qui divites erant non multum curiosi erant ad perquirendas eas quia in multis locis sunt modo quatuor vel tres ecclesiae ubi tunc temporis non erat nisi una et sic inceperunt minui." 1066 A.D

In addition to the concluding words of this section, we have other evidence that at that time the general practice of payment of tithes was much discontinued. For in *Domesday*, churches are frequently mentioned by the words, "Ibi Ecclesia et Presbyter," and how many carucas or hides of land, how many villeins and other endowments and revenues belong to them, are reckoned with their values. And sometimes tithe is mentioned, *e.g.*, under Terra Osberni Episcopi in Bosham in Sussex, "Decimam Ecclesiae clerici tenent et valet XL. shillings;" so that it would seem that they were intended to be mentioned, yet is such mention very rare.[1] And sometimes also grants of tithes by lay owners are mentioned. But I doubt

[1] "The cause of the diversity may perhaps be discovered in the instructions issued to the commissioners. In the *Inquisitio Eliensis* the instructions contain no express mention of churches; and if this was the general form, it follows that the commissioners were left to return the parish churches or not at their pleasure."—*Lingard*, I. 398.

"We may conclude—(1) that the absence of any mention of tithe in

1166 A.D. whether too much weight has not been given to this argument of rarity by Selden, since, as he also suggests, in some counties there is rarely a parish church noted, so that probably there was not absolute uniformity as to how far things sacred which were not held by any lay fee were to be entered. Moreover the Priories undoubtedly exercised some influence on the schedules in their districts, and it is possible that they considered the insertion of tithes inadvisable. Probably the rarity of the mention of tithes is to be ascribed more properly in part to each of these causes.

Selden, 225 In a synod held about the Conquest, divers laws, preceding about the punishment of crimes by fasting, a persuasion follows for alms, etc., and in it we read: "Let tithes be paid of all that is possessed through the Lord's bounty;" which certainly looks as if the practice of exacting them strictly was not in force.

There cannot have been any long interval before a revival commenced. Henceforth the Bishop's Court sat apart from the secular Court, and had undoubted jurisdiction to enforce payment of tithe; and we have, more-
Selden, 226 over, a canon of a council held at Windsor, probably under Lanfranc, which, according to William's practice, we may believe had received the royal assent, if passed in his reign, in these words: "Ut Laici Decimas reddant sicut scriptum est."

Moreover, the abbots, many of them appointed from abroad, would be likely to use the power which they undoubtedly had during the reigns of both the Williams
Selden, 226 and Henry I. In a Convocation at Westminster, held in 3 Henry I., under Anselm, Archbishop of Canterbury, and Girard Archbishop of York, it was ordained: "Ut

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the return of a church is no proof of its non-existence. (2) That some of the old minsters, such as that of Grantham, still possessed the tithes of a large surrounding district. (3) That consecrations of tithes had already taken place among the Anglo-Saxons, since the tithes of Thary's lands had been consecrated to a distant church, the Abbey of Peterborough."—*Lingard*, I. 405.

Decimae non nisi ecclesiis dentur." And this Ordinance had the assent of the King and the greater barons. And in the laws of Henry I. the eleventh title is: 1119 A.D.

"De placitis Ecclesiae pertinentibus ad regem."

2. "Si quis rectam decimam superteneat, vadat praepositus Regis et Episcopi et terrae Domini cum Presbytero et ingratis auferant et ecclesiae cui pertinebit reddant et nonam partem relinquant ei qui decimam partem dare noluit. Reliquam in duas partes dividant dimidium habeat dominus dimidium habeat episcopus sit homo regis vel alterius." Selden, 227 A. L. & I. 225.

3. And then follow provisions for Romfeoh, etc.

At a council under William the Archbishop, 1129, it is decreed: Tillesley, p. 164

"Decimas sicut Dei summi Dominicas ex integro reddi praecipimus."

For the next assertion of the rights of the Church we have again to thank a Legatine Synod, held in London in the third year of King Stephen's reign.

"De omnibus primitiis," the canon is, "Decimas dari Apostolica auctoritate praecipimus, quas qui reddere noluerit anathematis in eum sententia proferatur." Selden

And we may well believe that this canon would not have been so worded had the laws of Edward and Henry been at that time generally and easily enforced. Nor were the ways of Church jurisdiction made more smooth in the first half of the ensuing reign. By the Constitution of Clarendon it was provided *inter alia* that the King's Court should decide whether a suit between cleric and layman belonged to the Church Court or not, and that there should be an appeal from the Archbishop's Court to the King's Court for failure of justice.

Practically, indeed, these provisions do not directly, except in so far as they fetter the power of excommunication and allow an appeal to the King's Court, affect the Church's jurisdiction over payment of tithes; but they must inevitably have had a prejudicial effect on the power of the Church Courts.

1170 A.D. Six years later Papal influence again comes to the fore. A Decretal Epistle, sent by Alexander III. to the Bishops of Worcester and Winchester, recites the general institution (which may be understood for custom) of the Church of England to be that every parishioner should pay his tithe corn to his own parish:—

Selden, 283 "Cum homines de Hortuna secundum generalem Ecclesiae Anglicanae institutionem, de frugibus suis novem partibus sibi retentis, Decimas Ecclesiae cujus parochiani sunt sine diminutione solvere teneantur."

In the letter to the Provinces of Canterbury the same Pope in the Preamble says:—

"Quod cum Parochiani vestri Decimas bonorum suorum consueverint Ecclesiis, quibus debentur, cum integritate persolvere; nunc tam laudabile consuetudine praetermissa, quidam ex eis de lana et de foeno et de proventibus molendinorum et piscariarum Decimas ipsis Ecclesiis subtrahere non verentur."

Again he sent a Pontifical Decree to the Archbishop of Canterbury and his suffragans to admonish all men in their

Selden, 228 several dioceses: "Et si opus fuerit sub excommunicationis districtione compellere ut de proventibus molendinorum, piscariarum, foeno, et lana Decimas Ecclesiis quibus debentur cum integritate persolvant."

Selden, 228 And again to the Bishop of Winchester he writes:—

"Mandamus quatenus Parochianos tuos de apibus et de omni fructu Decimas persolvere Ecclesiastica districtione compellas."

Selden, 146 But of his Decretal Epistle to the Monks of Boxley, commanding a parochial payment, Selden says, that his ground is from a parochial payment in that particular, without which he had been as uncertain there, as he and others are in Epistles of that time (*i.e.* about the parochial right to tithes).

Selden, 145 And indeed that right does not seem to have been better ascertained on the Continent than it was in England at this time, since Alexander says:—

"Sane cum huiusmodi quaestio temporibus praedecess-

orum nostrorum mota fuerit, non determinata, aliis intuitu Territoriis, aliis Personarum obtentu Decimas asserentibus debere persolvi, non est nobis facile certum tibi dicere." 1175 A.D.

Certain canons were passed (according to Wilkins, at the Council of Westminster, held in 1173), of which those which are given in the note are important. Wilkins, I. 474

Two years later, under the same Archbishop, Richard of Canterbury, a Provincial Synod was held at Westminster, at which Henry and his son were present. Several of the canons just referred to were enacted in an expanded form. Selden, 228 Wilkins, I. 478

"I. Nullus praesumat intrare ecclesiam absque praesentatione advocati ecclesiae, et impersonatione diocesani episcopi, vel officialis ejus per ipsum.

"II. Monachi albi non praesumant amodo detinere decimas, quas colunt in parochiis ecclesiarum, quas eadem habere solebant. Item non praesumant habere ecclesias contra statuta ordinis sui.

"IV. Conjugati ecclesias non habeant, seu ecclesiastica beneficia.

"V. Filii non succedant patribus in ecclesiis.

"VI. Nullus det ecclesiam in dotalitium.

"VII. Nulli detur ecclesia, qui signum clericale non habeat.

"VIII. Excommunicationi subjaceant qui detinuerunt decimas de lana, de lino et similibus.

"IX. Non pro communione vel chrismate vel baptismate vel extrema inunctione vel sepultura denarius vel aliquod pretium exigatur.

"XI. Laici ecclesias ad firmam non habeant.

"XIX. Judaei non praesumant amodo evacuare parochias ecclesiarum per occupationes suarum domorum vel terrarum.

"XXI. Monachi firmas non teneant, vel canonici claustrales curam parochiarum agant.

"XXIII. Wallenses non vendant ecclesias vel dent in dotem. . . .

"XXVII. Vicarii perpetui qui personis ecclesiarum fideli sacramento obligantur, se contra personam non erigant.

"XXVIII. Pensiones aliis non faciant clerici in ecclesiis occulte et sine assensu episcopi, ut alii eisdem succedant.

"XXIX. Terrae non accipiantur amodo in pignus quin fructus terrae medio tempore percepti in fortem computentur.

"XXX. Laici non recipiant praemia pro praesentatione personae, nec episcopi pro praesentatione nec officiales sui.

"XXXI. Donationes ecclesiarum et praesentationes personarum factae viventibus irritae sunt.

"XXXVII. Clerici vel monachi vel ecclesiis dediti non negotientur."—From the *Cottonian MSS.*; the date rests on the authority of Wilkins.

1200 A.D. and in particular the following canon is taken from a Synod at Rosne in these words :—

"Omnes Decimae Terrae sive de frugibus sive de fructibus Domini sunt et illi sanctificantur. Sed quia multi modo inveniuntur Decimas dare nolentes statuimus ut Papae praecepta admoneantur semel secundo et tertio, ut de grano, de vino, de fructibus arborum, de foetibus animalium, de lana, de agnis, de butyro et caseo de lino et canabe et de reliquis quae annuatim renovantur, Decimas integre persolvant. Quod si commoniti non emendaverint, anathemati se noverint subjacere."

Spelman, I. 126 At a Council held in London, under Hubert, in 1200, against the prohibition of the King's Courts, it was decreed :—

"Ne Decima minuatur occasione mercedis servientium vel messorum.

"Deo et Sacerdotibus Dei Decimas dandas. . . de omnibus quae per annum renovantur id inviolabiliter decrevimus observandum."

And in the fourteenth chapter : "Ne aliquis sine episcopali auctoritate ecclesiae beneficia de manu laica recipiat."

Thus far we have inserted the principal synods and laws at considerable length, because it is necessary to have all the data for ascertaining what were the "whole rights and liberties of the Church from 1215 to 1225; but the chaos which ensued, the "discordiae inchoatae" referred to below, renders it unnecessary to follow the next few years, until

Wilkins, I. 542 we come to the degrading peace of 1213, by which John undertook to make to the Church "De ablatis autem plenam restitutionem et de damnis recompensationem sufficientem omnibus impendemus tam clericis quam laicis ad hoc negotium pertinentibus non solum rerum sed omnium libertatum," and promised to preserve "restitutas libertates . . . a tempore discordiae inchoatae."

This was in effect confirmed by the Great Charter in 1215, in the first chapter :—"We have granted to God, and by this our present Charter have confirmed, for us and our Heirs for ever, That the Church of England shall be free,

and shall have all her whole rights and liberties inviolable." 1216 A.D.
But as this becomes formally and strictly a statute in 1225, we are entitled in interpreting it to use as evidence to assist in showing what were the whole rights and liberties two more Constitutions recorded in the interval.

In the Constitution agreed to at the Concilium Dunelmense,[1] held about 1220, there is a section "De Decimiis solvendis;" and at the General Council held at Oxford in 1222, many titles are of importance:— Wilkins, I. 572 Wilkins, I. 587.

"XII. Ne beneficia renuncientur sub pactis: Districtius inhibemus ne quis ecclesiae suae renuncians a substituto sibi recipiat vicariam, cum vehementer posset praesumi, quod talia fierent per illicitam aliquam et turpem pactionem. Quod si ab aliquo praesumptum fuerit, statuimus ut et ille vicaria et alter personatu privetur. Illud etiam absurdum reputamus, ut aliquo existente persona alicujus ecclesiae, alii de consensu ipsius personae aliquid conferatur in eadem ecclesia nomine personatus, nisi persona prior totam ecclesiam prius duxerit simpliciter resignandam.

"XIII. Ne una ecclesia dividatur in partes: Districtius inhibemus de novo ecclesia aliqua pluribus rectoribus, quorum uterque sit persona committatur regenda. In ecclesiis autem ubi nunc plures personae existunt; statuimus ut singulis decedentibus accrescat viventibus portio decedentis donec ad unum solum illius ecclesiae perveniat personatus. Nec plures vicarii in eadem ecclesia constituantur, illis ecclesiis exceptis quae ab antiquo divisae fuerunt.

[1] "De Decimiis solvendis: Decimas autem de omnibus quae per annum renovantur, vel lege divina, vel consuetudine appropriata debitas et maxime consuetas dandas esse decrevimus, et districte praecipimus; ita ut occasione mercedis servientium in autumno vel messorum ecclesiae decima parte non frustrentur. Detentores decimarum praedictarum, si semel secundo et tertio commoniti excessum suum non emendaverint, usque ad satisfactionem condignam per censuram ecclesiasticam compellantur. Cum autem hi qui decimas detinuerint vel surripuerint, ad poenitentiam accesserint, non admittantur nisi per se vel per sufficientem procuratorem in manu sacerdotis illi cui decimae debentur, satisfaciant competenter."—*Concilium Dunelmense.*

1222 A.D. "XIV. Quibus personis conferri debent vicariae." This section provides that he must be ready, "personaliter ministrare ac talis existat qui infra breve tempus in presbyterum ordinari valeat."

"XV. De minoribus beneficiis tantum residentibus conferendis.

"XVI. De statu vicariarum: Statuimus igitur, ut perpetuo vicario ad minus quinque marcarum reditus assignetur, qui scilicet pro quinque marcis dari possit ad firmam, nisi forte in illis partibus Walliae sit, in quibus propter ecclesiarum tenuitatem, minori stipendio vicarii sunt contenti. Provideat que diocesanus episcopus, pensata ecclesiae facultate, utrum vicarius onera ecclesiae subire debeat, an persona, an ab ea simul debeant utrique conferre."

And in the Statutes edited by Archbishop Langton, passed at the Council, we find:

Wilkins, I. 596 "De firmis: Nullus clericus aliquod beneficium ecclesiasticum alicui laico tractat ad firmam, nec etiam fructus decimarum ante separationem earundem vendere praesumat," etc.

"De Decimis: Decimae tam praediales quam aliae sine difficultate et sine diminutione cum omni integritate solvantur secundumque canonum instituta. Concedimus etiam, quod quilibet in parochia sua habeat auctoritatem coercendi, et si contumaces fuerint, et commoniti se non correxerint, ipsos excommunicandi. Nullus laicus per quantumcunque temporis diuturnitatem immunitatem sibi vendicet decimarum quarumcunque praestatione, cum laicus secundum sacrorum canonum instituta decimas praescribere non possit item in praestandis decimis, et maxime praedialibus, nullae deducantur expensae.

I H. & S. 143 Before passing on, a short description of the progress of the practice in Wales[1] is necessary, since henceforward the

[1] About A.D. 550, Gildas speaks familiarly of "Parochiae" as the established rule in Wales, and as endowed. Parochiae there means dioceses.—*I. H. & S.* 150.

laws of the two countries as to tithe are treated in most of the Statutes together. 900–1000 A.D.

In the *Canones Wallici* no mention of tithe appears, but it is well to notice the two following sections, viz., XL. "Si laicus clericum qualibet causa competere voluerit episcopi veniant arbitrio," and the next chapter, XLI., "Si clericus laicum competere voluerit ad judicis poenitentiam debent venire," since, by comparing them with the corresponding Welsh law [1] of a later date, we see that the right of the cleric to carry his suit for tithe against a layman to the Church Court was established at any rate in Wales at a later date than the *Canones Wallici*. The Bishop of St. Davids was present at the Legatine Synod of 786 A.D., so that a certain limited effect may have been given to the provisions thereof in his diocese. We also learn from the *Venedotian Code* that the priest of the household was to have a third of the King's tithe; and later on that the priest of the Queen I. H. & S. 133

I. H. & S., 226

I. VIII. 8

[1] *Supplement to the Laws of Howel Dda.*

"Three persons who are to have tithes; a priest," etc. . . . "a priest is to have Christ's tithes."—x. 7–10. I. H. & S. 48

"If a man of a Church sue a man of a Court, let him sue in the Court."—x. 14, 2.

"Hence a man of a Court is not to carry his suit to the Church more than a man of the Church to the Court, because the Sword enforces the rights of the Crozier."—x. 14, 3.

"However, there have been seven precedences established for the Church as the chief against the Court: those seven are tithe-offering; . . . for each of those a man of a Court is to make amends to a man of a Church at his Church."—x. 14, 4.

"There are three sorts of proprietors—those naturally born free, men of the Court, and Clergy . . . and to the third class, or the Clergy, there pertains the privilege of teachers, with an allowance to each from every plough within the district where he shall officiate as an authorized teacher, and his land of privilege free to him, and his maintenance secured to him under the privilege of his sciences.—xiii. 2, 193.

"There are three functions pertaining to the Clergy—imparting instruction to the laity in their houses; second, keeping authentic records; thirdly, they are to be ready to impart information in respect of great events, and to arrange proclamations, and to enter what may be promulgated of judgment and custom upon record."—xiii. 2, 193.

1110 A.D. was to have a third of the Queen's tithe (p. 235), whence we may infer that probably in the 10th century tithe was levied in Wales, and to some extent devoted to sacred purposes. But the first authoritative mention of an enactment concerning tithe such as we are treating of is contained in the laws supplementary to the *Code of Howel Dda* already noticed.

Probably little effect was given to these laws at first, owing to the exceptional difficulties which the natures of the country and people have always caused in Wales; but at the end of the 11th century we have some evidence on the subject. Thus Anselm, in his letter to the Earl
I. H. & S. 300 of Shrewsbury and others, probably conquerors of a large part of Wales, mentions tithes.

About 1107 to 1112 the dispute raised by Urban of Llandaff against Wilfrid of St. Davids respecting the boundaries of their dioceses was decided against Urban;
I. H. & S. 309 and in an appeal for help to Rome, Urban says: "Nec tantum in territoriis ablatis nunc ecclesia desolata et dispoliata, verum etiam in decimis ablatis sibi, et omnibus clericis totius Episcopatus, tam laicali potestate quam monachorum invasione, quam etiam fratrum nostrorum Episcoporum, Herefordiae videlicet et Sancti Devi territorii simul et parrochiae grandi invasione."

And in 1119, Calixtus II. decrees to him secure possession of certain churches with tithes, and writes to Ralph, Archbishop of Canterbury, "Rogamus ut ei super iis qui bona ejus detinent justitiam facias;" and ultimately writes to Henry himself for assistance; and finally, in 1131, Innocent II. writes to Urban that the suit against the Bishop of St. Davids *De parrochialibus terminis* was to be decided at the Council of Rheims.

In 1126, in an agreement[1] between Urban and the Earl

[1] The words in the agreement are: "Concessit Episcopo . . . capellam de S. et decimam ipsius villae, et terram quam comes eidem capellae donat, unde sacerdos cum decima possit vivere; ita quod parochiani ad Natale Christi et Pasca et Pentecoste visitent matrem ecclesiam de Landavo, et de eadem villa corpora defunctorum ferentur humanda ad eandam matrem ecclesiam."—*I. H. & S.* 319.

of Gloucester, tithes are seen to be spoken of as a matter of course. But it is probable that still great difficulty was found in enforcing payment, until Giraldus Cambrensis came to the fore. 1170 A.D.

Barri, commonly called Giraldus Cambrensis, was born in 1147, and after his return from Paris in 1172 entered orders. Having observed with much concern that his countrymen the Welsh were very backward in paying tithes of wool and cheese, he applied to, Richard,[1] Archbishop of Canterbury, and was appointed his legate in Wales for remedying this and other disorders. He succeeded so well that, with the exception of the Flemings of Ross—a colony settled on the borders by the English monarchs, and consequently on ill terms with the Welsh —the refractory tithe payers were readily brought to submission, remunerating themselves for their compliance and signalising their piety by a general foray upon the disobedient Flemings. Among the ringleaders who still held out and set the new minister at defiance was William Karquit, High Sheriff of the county. To mark his contempt of Giraldus and his novel authority, he carried off eight yoke of oxen from the Priory of Pembroke. Three times he was summoned to restore his plunder without effect, and then Giraldus sent him word that as soon as all the bells of the monastery sounded at triple intervals he might rest assured—if he could rest then—that he was no longer within the pale of the Church. On the return of his messenger, Giraldus forthwith convened the monks and clergy, and with bell, book and candle, proceeded to

[1] According to Giraldus, the Welsh Church lost its independence of Canterbury about the time of Henry I.

Later on Giraldus writes: "Omnium quoque rerum quas possident, animalium, pecorum, et pecudum, interdum decimas donant; quando videlicet vel uxores sibi maritali copula jungunt vel peregrinationis iter arripiunt aut quamlibet vitae suae, Ecclesiae consilio, correctionem assumunt. Hanc autem rerum suarum partitionem decimam magnam vocant. Cujus duas partes Ecclesiae suae baptismali, tertiam vero Episcopo diocesano dare solent." — *Descriptio Cambriae*, chap. xviii. Record Office, Vol. VI. 203

1200 A.D. carry the sentence into execution. The doleful clanging of bells announced to all the surrounding country that William Karquit, High Sheriff of Pembroke, was deleted from the muster-roll of the saints. Henceforth, whatever he might be in this world, he was but a dead dog in the estimation of the faithful. The penalty was too great. Next day "the thief" hastened to the castle of Lanwadine, made his humble submission to his diocesan and Giraldus, restored the plunder, was duly birched and absolved.

And still more instructive perhaps is the account which relates that when Roger Buchet had deducted one stone of wool of ten which he owed to a creditor in order that he might send it to his baptismal church, promising to pay it later, a miracle happened, for when the creditor weighed the wool over and over again, he always found ten stone.

The Church which could work such miracles as these was certain to succeed in collecting its tithes without lay assistance.

CHAPTER III.

VARIATIONS IN THE LAW AS TO THE PAYMENT OE TITHES BEFORE MAGNA CHARTA.

In the first chapter we were left with four classes in possession of the Church revenue—(1) the bishop and his clergy; (2) the monasteries and their vicars; (3) the priests attached to the estates of the great landowners; (4) priests who were settled in districts and possessed the tithe or glebe without accounting therefore.

At first the priests would doubtless be selected by the great landowners, in many cases without reference to the bishop, perhaps even from stray missionaries or laymen. But as the power and organization of the Church increased, it became usual for the churches built by laymen to be consecrated, and for the incumbents then to be approved, and probably sometimes selected by the bishop. When that was so, the cleric would be debarred from sharing in the episcopal fund, and would in fact be the parson of a separate parish, with right of sepulture and baptism, and the fees attached thereto and tithe. "Neither was it wonder," as Selden says, "that the Bishops should give way, for had they denied that to lay founders they had given no small cause also of restraining their devotion. Every man questionless would have been the unwillinger to have specially endowed the Church founded for the holy use, chiefly of him, his Family, and Tenants; if withal he might not have had the liberty to have given his Incumbent there resident a special and several maintenance, which could not have been had the former community of the clergies revenue still remained. . . . And after such time as

upon Lay foundations churches had their profits so limited to their Incumbents no doubt can be but that the Bishops in their Prebends or Advowsons of Parishes, both in cities and in the country, formerly limited only in regard of the minister's function, restrained also the profits of every of their several churches to the Incumbents; that so a uniformity might be received in that innovation of parochial right."

Selden, 255 Lay foundations are mentioned by Bede, 700 A.D., and probably became frequent about 800; and in the council mentioned above, held by Wilfrid 816 A.D., we find: "Ubi ecclesiae aedificentur a propriae Diocesis Episcopo sanctificentur."

The difficulty in tracing the growth of the connection between the parishioner and his church arises from the fact that there are three points of connection, each of which may be indeterminate in a given instance; (1) There is the fact that the individual attends the church either from convenience[1] or preference; (2) that there is the payment of sepulture or other fees; and (3) there is the payment of tithes.

These indeterminate quantities were reduced to two in France by the enactment at the Council of Tribur in 895 A.D.: "Ubi quis Decimas persolvebat vivens ibi sepeliatur et mortuus." And the Council of Arles had already in 812 A.D. settled "ut ecclesiae antiquitus constitutae nec Decimis priventur," wherein "antiquitus constitutae" was generally held to mean, to which tithes had customarily been paid.

Probably exactly the reverse process was pursued in England. From the words in the *Dooms of Ine*, coupled with the subsequent enactments, we know that

[1] "In 867 A.D. capitula of the Emperor Louis II. provided that the tithes of newly cultivated lands, when adjacent to those already in cultivation, should be paid to the older church; but if at a distance of more than four or five miles, any worthy person should have recently reclaimed wild or forest land, and should have built a church there, he was to be at liberty to endow it with the tithes of the newly reclaimed lands."—Lord Selborne on *Tithes*, 87.

Church scot was paid to a minster by the inhabitants who had their houses in a certain district.

From the words in Athelstan's *Ordinance*, coupled with the subsequent enactments, we know that every ordinary individual belonged, so far as the rights of sepulture were concerned, to a district, and that the fees for sepulture in each district belonged to some minster.

We may probably infer from the wording of Athelstan's *Ordinance* "that there be given the Church scot and the soul scots at the places to which they rightly belong," that the district over which a minster claimed the right of sepulture usually coincided with the district throughout which Church scot was claimed from the inhabitants.

In the formation of these districts we have, in addition to the considerations already noticed, to reckon with the popularity of the monasteries as places of burial; but that vicinity had also something to do with forming the district may be inferred from the words in the *Concilium apud Habam.*

At the time of Edgar's law these districts were defined, and the districts over which the right to tithe belonged to particular minsters were not defined. Or perhaps it is safer to put it, that the right of a particular minster to Church scot or to the right of sepulture was much better defined than the right to tithe. The earliest distinction as to buildings consecrated for worship with which we are acquainted in England is between a church which had baptisterium or sepulturam, and a chapel which had not. Probably the original distinction was only whether it had sepulturam or not.[1] That the question whether baptisterium et Sepultura were attached or not was still the criterion as late as 23 Hen. III. appears from a case in that year,

[1] "As late as 1800 there existed parochial chapelries of a nature distinct from mere chapels of ease, and having substantive rights of their own. That a chapel is such a one may be evidenced by the accustomed solemnization of baptism and sepulture within the precincts, or by establishing a prescription exempting the dwellers within the chapelry from contributing to the repairs of the supposed mother church."—*Toller*, 58, 59.

where William of Whitstanton claimed against the Archbishop of Canterbury that Ecclesias de Hey was of his advowson, and the Archbishop pleads that it is not: "Ecclesia imo Capella pertinens ad matricem Ecclesiam ita quod non est ibi Baptisterium neque Sepultura imo omnes qui nascuntur ibidem baptizantur apud Terringes et similiter omnes qui moriuntur sepeliuntur apud T.," etc.

We know of no other distinction than this between the sacred buildings themselves apart from the ownership of the advowsons before the date of Edgar's law. We shall therefore assume that up to this date this was the only recognized distinction,[1] so far as the consecrated building was concerned. That being so, there were no means, theroretically, of distinguishing any church which was consecrated, however lately, with the rights of baptisterium and sepultura, from the older churches to which those rights had belonged beyond living memory. Now the churches which were worked by the diocese contributed certainly some part of their tithes to the diocesan fund, but the monasteries and the other churches which worked

[1] *Division of Churches into recognised Classes.*

This appears with reasonable certainty from the following considerations:—Sect. 5 of the laws of the *Conc. Enham*, soon after, viz. in 1014, provided that—

"All churches are not secularly entitled to equal rank, although divinely they have like consecration. For the grith bryce of a chief minster in cases entitled to [atonement] bot, let bot be made according to the king's mund, that is with 5 pounds by English law; and of a minster of the middle class, with a 120-shillings that is according to the king's wite, but of a yet less with 60 shillings, and for a field church with xxx. sh. Judgment shall ever be with justice according to the deed, and mitigation according to its degree."

In the corresponding section of Knut's *Ecclesiastical Law*, the words are: "And of one yet less *where there is little service*, provided there be a burial-place, 60 shillings, and of a field church where there be no burial-place, 30 shillings."

A comparison of these two sections shows that it was found necessary to point out what was the criterion by which a minster of the middle class was to be distinguished from a yet less, whence we may infer that that additional distinction had not at the time of Ethelred assumed a form known to the law.

separately did not. Hence the consequence of consecrating a new church with the rights must have been that henceforth it stood on an equality with the other separate churches and could claim to retain the whole of the tithe of its district. Thus the bishops would be compelled either to refuse to consecrate fresh churches with the rights (which was objectionable), or to see the whole expenses of the diocese thrown on a continually diminishing district (which was palpably unjust). We should expect then as an equitable arrangement that the new districts[1] should be made to contribute the same amount as they contributed before the division, and we find that such was in fact the case.

Edgar's laws distinguish between three kinds of churches. (1) The older or principal church; (2) churches with burial grounds which the lords of manors or other seignories might have in their lordships and (3) churches of the latter sort without burial grounds. They recognise the title of the older or principal church to the tithes arising within the "adjacent district" except when there might be within that district any church of the second class, in which case one-third of the tithes was to be paid to that church, the older or principal church taking the rest.

In spite of the great deference due to Lord Selborne's expressed opinion, there does not seem to be sufficient ground for doubting that the law of church grith as given above is authentic, and even independently of section 6 of that law it is not improbable that the tripartite division of tithe was more or less in vogue among the dioceses during the 9th and 10th centuries.[2] If this be so churches of the

Lord Selborne, 51-52, notes

[1] The churches of more recent foundation were divided into two classes, those with and those without a burial ground. To the first probably because they must have been considered of greater necessity by the bishop, one-third of the tithes were allotted, and in Domesday we find several churches in possession of that portion of the tithe from the manor or township.—*Lingard*, I. 186, *note*.

[2] Lord Selborne objects to a similar explanation on the ground that there never was a time when a parish priest, whether rector or vicar, having cure of souls, was held to be exonerated from the general

On Tithes, 226.

second class, which formed part of the old diocesan collection would receive from the diocesan fund one-third only of the tithe which came from this district. This rule would probably apply to all the churches founded originally by the diocesan body or consecrated by the bishops and worked by the diocesan body. On this hypothesis then all that Edgar's law did was to mark off the old minsters then existing from the new churches which had recently been or might in future be built, and to assimilate for the future the rules which were to be applied to these latter to the rule which was already in vogue amongst the diocesan bodies. Hence I believe that the words older minster in Edgar's law included (1) the monasteries, (2) the churches worked by the diocesan bodies, (3) churches which had been founded in a district of older formation, such as Kemble suggested, and (4) those churches which had been built by the great landowners and consecrated with the rights of baptisterium and sepultura so long before as to be no longer distinguishable from an old minster.

Speaking generally then, what Edgar's law did was this. It provided that in future the mere consecration of a new church with all rights should not prevent the division of the tithe in the same proportion as before; one-third was still to go for the servants of God in the district; the remaining two-thirds were still to go to the older minster, where doubtless many expenses had now become so obligatory that the loss of any permanent income could ill be borne.

The monasteries we may safely believe were not intended

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ecclesiastical duty of hospitality, according to his means, to the poor and to strangers; but surely it cannot be doubted that a priest who ministered to a district which paid its tithe to the diocesan fund, and received his stipend from that fund was exonerated from such duty; and it is at least probable that as such a ministry grew to be a separate endowment the provisions for the performance of that duty by the central body would remain, so long as the two-thirds of the tithe was received.

to be and were not affected by the law; for there was no need for consecrating a church with full rights in a district belonging to a monastery, nor would the monastery have permitted such an infringement of its privileges.

We can see in the third and fourth of these classes how the districts attached to the older minsters were defined. For where a church was built in a district where there was an older religious establishment, the church would naturally attach to itself, if the explanation given above is correct, the paying district included in that establishment, and where a church [1] was built by a great landowner to serve his own estates, it seems to be clear that the district attached was usually coterminous with those estates; [2] but it is not possible to trace with certainty on what principles the diocesan body [3] proceeded in the first instance in limiting the district to which it ministered, and afterwards in subdividing that district. As the view of modern English law on this subject of division is practically a reproduction of the passage in 'Blackstone's Commentaries' we give that passage. [4]

As such great weight has been attached to these

[1] There are in particular places special customs which must necessarily have had their origin in express grants from the lords of the soil, for the payment of tithes in respect of matters not generally tithable. By the custom of the parish of Stanhope in Durham in tithe of lead, ore, and other minerals was payable.—*Lord Selborne*, 141.

[2] Numerous cases show that the parish was often coterminous with the manor, thus: In a case in 25 Hen. III. R. claimed the presentation to the Church of H. from the Prior of Lewis. The King had presented before and now had granted all that he had in the Manor of H. to R. Agreed that the seisin of the adowson passed to R.—*Rot. Plac.* 111.

[3] According to Selden, the bishopricks were most usually at first ordained and limited according to the distinction of seats of government, so were parishes appointed and divided according to the conveniences of country towns and villages, one or more or less to a parish.—*Selden*, 80.

[4] A parish is that circuit of ground which is committed to the charge of one parson or vicar or other minister having cure of souls therein. Cf. Selden, 260

Before the time of King Edgar the consecration of tithes was in general arbitrary, that is every man paid his own to what church

remarks, it is perhaps necessary to say why we have given the somewhat dissimilar account which precedes it. In the first place then (putting aside the explanation which connects parishes with estates), in so far as the passage is cited to show the original formation of parochial districts, such citation is based on an assumption; since Blackstone subsequently defines parson as, "persona ecclesiae, one that hath full possession of all the rights of a parochial church." As to Edgar's law it has been pointed out by

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or parish he pleased. But this being liable to be attended with either fraud or at least caprice in the persons paying, and with either jealousies or mean compliances in such as were competitors for receiving them, it was now ordered by the law of King Edgar that dentur omnes decimae primariae ecclesiae ad quam parochia pertinet. However, if any thane or great lord had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister, but if not, the thane must himself have maintained his chaplain by other means, for in such case all his tithes were ordained to be paid to the primariae ecclesiae or mother church. This proves that the kingdom was then generally divided into parishes, which division happened probably not all at once but by degrees. For it seems pretty clear and certain that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords as Christianity spread itself began to build churches upon their own demesnes or wastes to accommodate their tenants in one or two adjoining lordships, and in order to have divine service regularly performed therein obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister instead of leaving them at liberty to distribute them among the clergy of the diocese in general, and this tract of land the tithes whereof were so appropriated formed a distinct parish, which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from his estate but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of these disjointed lands, especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed and parish churches endowed with the tithes that arose within the circuit assigned. But some lands,

Lord Selborne, that Blackstone's conclusion that this proves that the kingdom was then generally divided into parishes, depends upon the word "Parish," which is equivocal, and in part perhaps upon the meaning of older or principal church. Mr. Johnson translated it minster, and it might mean the cathedral of the diocese. Selden considered that it meant the ancientest church or monastery to which a landowner having no church of his own might usually repair. Blackstone's conclusion, therefore, does not agree with the opinions of men almost equally competent to judge. No doubt if and so far as churches throughout the kingdom had been placed on a more equal footing as to the collection and expenditure of their revenue, the division into parishes,[1] which we now know,

Lord Selborne, 142

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either because they were in the hands of irreligious (Hargreaves' note says: "On the contrary many extra parochial places appear to have been the sites of religious houses and others of royal palaces") and careless owners or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra parochial; and their tithes are now by immemorial custom payable to the King instead of the bishop in trust and confidence that he will distribute them for the general good of the church.—Blackstone's *Commentaries*, I. 112.

Pop. Abst., I., XXII.

II. Inst. 647
2 Rep. 44
Cro. Eliz., 512

[1] Subdivision of parishes has been going on from the first division until the present day. Thus Alexander III. sends his decree to the Archbishop of York reciting that he had heard that a certain town was so distant from the parish church that it was difficult for the inhabitants to repair thither, and that the church revenue, although the town were exempt, was sufficient for the minister of the mother church, and commands the archbishop to build in that town a church, and with assent of the founder of the mother church to institute at the presentation of the rector an incumbent who might have all ecclesiastical profits increasing in the limits of the town, and that he should do it whether the rector of the mother church would assent or not. Again in XIII. Hen. III. because the Church of St. Peter's in Chichester was very poor and that only two parishioners were in it, Ralph Neville, then Bishop there and Chancellor of England, applied to the King who granted that the said church should be demolished and the two parishioners assigned to the Hospital of St. Mary's which was near their church, and should thenceforward be parishioners of the said Hospital.

Lord Selborne, 143
Selden, 267
Cf. the Statute 17 Car. II., Chap. III., post, 105.

was likely to follow. And if we are to attribute the Liber legum ecclesiasticarum to the date assigned for it by Wilkins, 994 A.D., then parishes with determinate tithe paying areas were already at that time the rule (though apparently Parochia had not attained its technical sense). But such division could not have been complete; for, as to the extra parochial districts, probably Blackstone's text is more nearly correct than Hargreaves' note. From the fact so much insisted on by Selden, that arbitrary consecrations of tithes by laymen were common in the eleventh and twelfth centuries as well as from the *à priori* probabilities of the case, we may infer that many of the thanes who had not built churches on their own estates had yet successfully withstood any attempts, if such had been made, to include them in the district ministered to by their diocesan body or by any neighbouring monastery or old minster. Later on, indeed, the canon law provided that the bishop was to have all tithes growing in lands not assigned to any parish within his diocese. Yet this canon being against the law of the land, never had allowance within this realm,[1] for in such parts of forests as are out of any parishes, the King shall have them. And this is made clear by a grant by Edward I. of tithes coming of land within the forest of Deane, as were not within any parish, to the Bishop of Llandaff and his successors.

Edgar's law was renewed fifty years later by Knut, and although it was powerless against the monasteries to prevent their taking a grant of the whole tithe of a district, yet it is probable that it did effectually stop the fresh grants of the undivided tithe of a district already appropriated to parish churches to which the district did not belong. For all the lay grants of tithes apart from

[1] According to the fundamental principles of the common law, all land is equally charged with tithes; to suppose a single acre not charged is quite a mistake. From the earliest period tithes were everywhere due to somebody; even in extra-parochial places they are payable to the King.—J. & W. 528, Page *v.* Wilson.

churches are to religious houses and not to parish churches, and all are of Norman times. Now where a church was built and endowed at the same time, we know that no writing was necessary, but we do not know this in the case of a grant to a church of a different district. Before the Conquest, also, it is probable that gifts of endowments to a church were made by word of mouth and symbolical delivery, but this probability ceases at the time of the Conquest, and therefore the complete absence of all grants by laymen to other parishes is strong evidence to show that such grants were not made.

The monasteries, on the other hand, were well able, especially after the Conquest, to defend whatever was given to them, and to monasteries there is no doubt that arbitrary consecrations, by laymen, of tithe were frequent. Blackstone, in the passage given [1] and elsewhere, attributes the whole of the subsequent irregularities to the monas-

[1] At the first establishment of parochial clergy the tithes of the parish were distributed in a four-fold division: (1) for the bishop; (2) for fabric of the church; (3) for poor; (4) for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, subject to the burthen of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the King's license and consent of the bishop must first be obtained: because both the King and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to a corporation; and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron is necessarily also implied, because the appropriation can originally be made to none, but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithe and glebe.—Blackstone's *Commentaries*, I. 384.

See post, p. 79

Comm. I. 384.

teries; and it is probable that in the main this view is correct. As soon as it became settled law that the tithes of a particular district appertaining to an old minster were to be paid, not at the choice of the lay owner to any neighbouring priest he pleased, but always to the priest of the district church, the right of presentation became of immensely increased importance. If the rector of the old minster attempted to enforce Edgar's law against a church of which the patronage was in lay hands, the patron could always frustrate him and usually obtain his own ends by giving the advowson to a monastery on whatever terms might be agreed to.

But in fact the patron had a more simple method still. For the tithes at this time passed with the church and other revenues from the patron by his gift alone without confirmation or assent of the ordinary, for the lay patrons had at that time a right, although a challenged right, to dispose of their churches as if they had all been donations by collation (without presentation), that is by investiture from their own hands only, which gave their incumbents real possession of the tithe of the church and all the revenues, no less than presentation, institution and induction do at this day. For notwithstanding that the canons of the Council of Westminster in 1119: Ne Monachi Ecclesias nisi per Episcopos accipiant, and many other canons provided that the assent of the bishops was necessary, yet it is certain that the practice was otherwise, and that churches with tithes were commonly given by lay patrons without the bishop's assent or institution, and that as well by filling them with incumbents as appropriating them to monasteries, chapters or otherwise.

Selden, 377 And we learn from a decretal letter of Alexander III., sent under Henry II. to the Bishops of the Province of Canterbury, that investiture or donation by the patron was then a part of the secular law. And it appears from Anselm's Epistle to Paschal II., how strongly the barons supported their right.

And it is by this right of investiture that the lay

patrons were able to grant rents and such like out of their rectories, which they very frequently did, sometimes making the incumbents bind themselves by oath to the payment thereof. And in a fine of 33 Hen. II. concerning the advowson of the church of Budeketun it appears that the patron was able alone without grant of the incumbent or confirmation of the bishop to charge the church with a pension.—And in addition to the further instances given by Selden note this one in the Year Books 33–35 Edward I. wherein the Prior of Longueville claimed an annuity reserved to the priory as patron, and the marginal note is: "Annuity without a specialty," and therein the judge says:

"In old times men could give their tithes where they thought fit; and it appears that since the patron by whom the church was first endowed reserved the six marks to his patronage as in right of his patronage it is sufficiently a temporal thing. The prior and the parson came to terms and the parson admitted that he had paid and was to pay the annuity, but said nothing of his predecessors, so that the church was not bound."

But those rights exercised by the lay patrons did not extend to clergy patrons as a rule, for in their cases if the church was not of exempted jurisdiction the bishop more usually instituted, and doubtless also some lay patrons willing enough herein to obey the canons after Anselm and perhaps before, arbitrarily filled their churches by presentation to the bishop, as sufficiently appears from the fines in which the bishop's assent to a grant by a layman is sometimes mentioned.

And the canons show clearly enough, as Giraldus Cambrensis says in his letter to Hugh Bishop of Lincoln that the bishop's institution is necessary; but then when the advowson came in question or even the right to the tithes, the common law is the rather to be looked at, since the plea was to be tried in the King's Courts even though it were between spiritual persons.

And this appears sufficiently from the writ of prohibition

set out by Lord Coke; the reasons for the prohibition being these: quia placitum praedictum tangit coronam et dignitatem nostram, praesertim cum collatio earundem decimarum ad nos possit devolvi ratione custodiae vel escaetae, quia etiam consimiles decimas conferimus in quibusdam dominicis, et similiter quamplures magnates regni nostri in dominicis suis. Lord Coke points out that if the H. Lincoln mentioned was Hugh Bishop of Lincoln, as is probable, the writ was in use before the constitution of Pope Innocent III., and further, from the reason quia etiam consimiles decimas conferimus in quibusdam dominicis et similiter quamplures magnates nostri in dominicis suis, argues that it is probable that the writ was in use before the constitution that confined tithes to parishes, and that thereby it is proved that at that time the King and the nobles of the realm might give their tithes to what spiritual person they would. Lastly (proceeds Lord Coke) albeit the King and the nobles be for honour sake named in the writ, yet the liberty of granting of tithes extended at this time to all the King's subjects. And so far indeed was the right carried, that if Selden's explanation is the right one, a patron who was also incumbent could either in his lifetime convey the benefice to his son or heir by grant, which by the practice of the time supplied as well a resignation as presentation institution and induction; or could so leave the advowson to descend to his heir, that he being in orders might retain the church in his own hands according as the law then it seems permitted. Against this was a canon made in the National Synod at Westminster in 3 Hen. I. Ut filii Presbyterorum non sint heredes Ecclesiarum Patrum suorum. And another in 25 Hen. I. It is not easy to see how such benefices could have been canonically right; and the fact that the custom was expressly found in the case of St. Peter's, Cambridge, seems to show, in spite of Selden's explanation, that legally they did not stand on a much better footing than they did canonically.

There seems to be no reason for doubting that those

owners whose land at the date of Edgar's law did not come within the district of any old minster or episcopal body or monastery retained absolutely unfettered their right to consecrate their tithes arbitrarily to any priest or religious body in whole or in parts, or perhaps even to retain them, up to the end of the 12th century. To this effect is the passage in Linwood:

"Ante illud Concilium bene potuerunt Laici Decimas in feudum retinere et eas alteri Ecclesiae vel monasterio dare; non tamen post tempus dicti Concilii."

And so says Parnynge, afterwards Chief Justice to Edward III.; and, according to Selden, "Herle there in his answer seems to admit it clear," wherefore we give the answer also:

"Parnynge: en ancien temps devant un constitucion de nouvel fait per le Pape, un patron d'un eglise puit granter dismes dans meme le paroche a un altre paroche a mult plus fort le roi a cel temps granť a tenir un eglise en propre oeps per que etc: Herle: Et ore ne puit p̃ homme ses dismes q̃ sont hors de paroche granť a que qu'il voudra, car Levesq del lieu les avera—ceo est encounter reson que homme ne purra my granter ses almoignes a que qu'il voudra."

And so again[1] Ludlow, Judge of Assize, in 44 Ed. III.,

[1] So more recently, in Sandes *v.* Drury, it was said that there was no right to parochial tithes here until after the Council of Lateran.—Sandes *v.* Drury, 1 E. & Y. 153.

And in the Dean and Chapter of Bristol's case, it was said that before the Council of Lateran it was lawful for every one to pay his tithes as he chose or any portion thereof to any church according to his best devotion.—Dean of Bristol's case, 1 E. & Y. 51.

How far the practice of paying tithes whenever they pleased prevailed among the Anglo-Saxons it is difficult to ascertain. That it was known among them is plain, but the following entry seems to show that the rights claimed there were an exception to the rule.

De Storey antecessore Willelmi de Aincourt dicunt, quod sine alicujus licentia potuit facere sibi ecclesiam in sua terra et in sua soca et decimam suam mittere quo vellet (Dom. I. 280). He could without leave build a church for himself and within his own jurisdiction, and send his tithe where he pleased. May we not conclude that others could not do so without leave?—*Lingard*, I. 406.

fol. 5, 6: "En ancient temps chacun home purroit granter les dismes de sa terre a quel Eglise il voudroit."

"Quod verum est," says Judge Brook, in abridging the case. It is plain (says Lord Selborne) that Ludlow referred to the lord or landowner, who alone could make a grant of the land or of any charge on it.

What that constitution of the Pope referred to was is not quite certain. Lord Coke thought that he had found the required document in a decretal epistle from Innocent III. about the year 1200, dated at Lateran, directed to the Archbishop of Canterbury, "Ut ecclesiis parochialibus juste decimae persolvantur," which view was adopted by Blackstone in the passage cited above. But it is pointed out by Lord Selborne that this was not a document likely to have been confounded by lawyers with a canon or decree of a General Council, and it is therefore possibly better to adopt the view that a constitution of the third council of Lateran was intended which provided that infeodation of tithes into lay hands and consecrations or arbitrary conveyances of them to religious houses without the assent of the bishop were not to take place in future.

Still, Lord Selborne, in suggesting this view, seems to rely somewhat on what Selden says, and Selden appears to have been very much in doubt. In such a conflict of authorities, the safest course will be to take the statement of Parnynge as it stands, and to consider that the change referred to took place about 1200 A.D. And accordingly henceforth we find that it grew frequent to have decretal epistles sent into every province both in England and elsewhere to ratify the former consecrations and appropriations (which the Pope began also at pleasure to declare sometimes void if made by laymen alone), and also to enact parochial payment of other tithes if not canonically conveyed out of the parish; and the reason sometimes was added that is: "Perceptio Decimarum ad Parochiales Ecclesias de jure communi pertinet." And the action for parochial tithes in those times, as now, is called "jure communi fundata intentio;" that is by common right tithes

praedial and mixed were due to the rector of the parish (were he bishop or priest) if they were not otherwise by special title enjoyed by some other church or discharged by canonical exemption. And that this was so in England sufficiently appears from the year books where the issues taken upon parochial limits are reported, whence it is seen to be clear law that if no other title or discharge be specially pleaded in the allegation of the defendant, every parson had a common right to the tithes of all annual increase (praedial and mixed) accruing within the limits of his parish, without showing other title to them in his libel, and so it remains to this day. But how little this common right had been practised before 1200 A.D. appears from the doubts already referred to, expressed by Alexander III. and others in their epistles.

Returning to note the changes of jurisdiction during these four centuries, we may assume, in the absence of all evidence to the contrary, that from beginning to end the Church never gave up the rights (1) of refusing admission to the Church and its rites to any defaulter in payment of tithes, and (2) of excommunicating any one in the case of continued default. As we pointed out before, it is probable that the remedies given by the laws of Alfred and Guthrun, and the laws of Edgar and subsequent ordinances, were merely ancillary; but it is equally probable that the Church willingly used these ancillary remedies so long as the connection between the ecclesiastical[1] and lay courts enabled her to do so with ease and effect.

After the Conquest came a change, and the parsons sued for subtraction of tithes in Court Christian, but if the right of tithes came in question it was tried by the common law, and therefore in the laws of Henry I. (as Lord Coke remarks), speaking of pursuit of tithes in Court Christian, it is said, "si rex patiatur." II. Inst. 490

[1] From Domesday it appears that in some places the King's officers had claimed for his lands exemption from tithe, but judgment was given in the hundred in favour of the Church. This would be before the alteration of the Courts by William.—*Lingard*, I. 404.

A. L. & I. 213

Probably the change came from the prohibition of William the Conqueror, which is given in the note. Therefrom we learn that thenceforth the defendants in ecclesiastical causes were to submit themselves to the Bishop's Court, and "secundum canones et episcopales leges rectum Deo et episcopo suo facere," and in default were to be excommunicated "et, si opus fuerit, ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibetur."

It has been suggested that this proclamation is inconsistent with Section VII. of the laws of Henry I.: "De generalibus placitis comitatuum,"—Wherein Section 3 begins: "Agantur itaque primo debita vere Christianitatis jura;" whence it is concluded that ecclesiastical causes were handled in the tourn in the reign of Henry I., long after the supposed charter. And (says Lord Coke) certain it is that the bishop's consistories were erected, and causes ecclesiastical removed from the tourns to the consistory after the making of the said red book. But the former objection has been explained by a reference to ch. XXXI. section 3 of the laws of Henry I., and the latter remark does not seem so inexplicable as to throw doubt on the charter.

If then we accept the charter as authoritative, we must take that which Lord Coke says of tithes, that of ancient they were determined in the sheriffs' turn, and the words "si rex patiatur" to be limited to cases wherein the right to tithes was in dispute, and even so the dispute ought really to have raised a point of general application throughout the parish, as may be inferred from the writ of prohibition already set out.

In considering this question of jurisdiction it is impossible to follow accurately what were the changes in the mode of exercising it. The vicissitudes of the power of the Church were so great, and their effect on the exercise of authority by the Church Courts so overwhelming, that it might probably happen that in one part of the country the ecclesiastical sanctions were amply sufficient, while in another part even appeals for assistance to the vicecomes might be in vain. In short, it is useless to follow historically the changes in a jurisdiction which could be

effectively exercised by such means as we saw Giraldus Cambrensis employ. How great were the vicissitudes, and what was the ultimate sanction in cases of dispute may be seen from the various steps in the quarrels of Urban of Llandaff noticed in Chapter II. There we have a trial of boundaries by jury, appeals to the Pope, decretal epistles, an application by the Pope to King Henry, and a summons to appear before a General Council all tried, and each one depending for effect upon the state of affairs at the time.

See ante, p. 42

Speaking generally, with only temporary exceptions, we may say that the appeal to the Pope in causes ecclesiastical was useless; and that after the reign of Henry I. the Church had to depend on the inherent force of excommunication with the very terrible penalties attached, or to use the assistance of the temporal power when either the local authority or the King was favourably disposed, and to go without assistance when it was difficult to obtain.

We have still to refer to the changes in the mode and amount of payment.

From the first the doctrine of the Church has been that the tithe as it grew was affected with a spiritual character; whence it followed that the mere not setting out of the tenth amounted to a wrongful conversion. This doctrine was never surrendered, nor was the truth of it in theory disputed.

It is not possible to trace the first origin of compositions and moduses; but they were probably common before the reign of John. In the case of personal tithes the use of compositions was probably almost as old as the practice of payment.

With regard to amount of payment, the first list which at all approaches completeness in England is contained in the laws of Edward the Confessor. As we have seen, it includes (besides those articles about which there could be little doubt) "tithes de bosco et molendinis et negotiationibus." There was no very material extension of this list before 1225, excepting, perhaps, the words contained in the Synod of 1175: "de fructibus arborum, etc."

CHAPTER IV.

FROM THE STATUTE OF MAGNA CHARTA TO THE REIGN OF HENRY VIII.

Now we start afresh from the law in the form determined by Magna Charta, and the points to which chiefly attention is required in the ensuing period are (1) statutory changes, (2) changes in practice, and (3) the great conflict of jurisdiction between the lay and spiritual courts, and (4) the conflict with the Commons.

In the first chapter we saw the Church formulating her claim, and turning what was at first a mere license into a legal right. Later we have seen her entering on the property so acquired, and affirming her title by constitutions, and securing its confirmation by enactments.

Now we are about to see the development of that property proceeding quietly for a short time, and then interrupted by the conflict with the Judges, and checked by the complaints of the Commons. Within the limits of the very general words employed in the various enact-
Post, p. 69 ments in her favour, the Church had the right to lay down what laws for the collection of tithe she pleased, and this she proceeded to do.

We shall obtain the best general view of the canonical law during the 13th and 14th centuries by glancing at the various Synods and Councils, and then turning to Lyndwood, whom we may more safely trust, to find out roughly what was the general result. In the constitution of W. de Blys, 1229 A.D., in the 15th chapter, we have a repetition to a great extent of the provisions of the preceding councils. The provision that personal tithe is to go to

the parish where the person lives, and not to that where it is earned, is important, as this point was still in dispute; and the provision for the presence of the rector or his substitute is noticeable. 1236 A.D.

In the Provincial Constitutions of St. Edmund, Archbishop of Canterbury in 1236, the 27th provides: "Nullus rector ecclesiae nobis subjectus decimas ecclesiae vendere praesumat ante annunciationem beatae Mariae, cum ex tunc, secundum consuetudinem, fructus cedere debeant ad debita vel legata solvenda;" which, when taken in connection with the numerous prohibitions against letting to farm already noticed, seems to imply that the parsons in those days preferred ready money to the prospect of a conflict with the tithe payer. At a provincial council held at St. Paul's in the same year, a Constitution concerning oaths was passed, which is of great importance in its bearing on personal tithes.[1] For the difficulty which the Church met with almost continuously in collecting personal tithes arose, not from any doubt as to the right, but from the difficulty of obtaining discovery.

The Constitutions of Walter de Cantilup, Bishop of Worcester, 1240 A.D., in the main coincide with those of W. de Blys concerning tithe. Of personal tithes he allows a *pro ratâ* amount to another parish where the stay is prolonged. And when sheep or cows "continue cubant in una parochia et continue pascant in alia, inter ecclesias decima dividatur."

Next we come to what Selden styles the chiefest of the English Canon laws made for tithes, both parochial and personal, which he attributes doubtfully to Robert Winchelsea, Archbishop of Canterbury, belonging to about 1295 A.D., saying that some attribute it to Archbishop

[1] "Jus jurandum calumniae in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quout veritas facilius aperiatur, et causae celerius terminentur, statuimus praestari de caetero in regno Angliae, secundum canonicas et legitimas sanctiones obtenta, consuetudine in contrarium non obstante."—Constitution of a Provincial Council of London, 1236 A.D., *Coke*, p. 657.

1250 A.D. Boniface in 1250. Wilkins, who also says it is ascribed Boniface in *MS. Regio*, IX. 13, 2, attributes it to Walt Gray, Archbishop of York, apparently on the authority the *Cottonian MS.*, so that it is possibly the ve Constitution referred to in the preceding paragraph l Selden, as one of which he had only a note, though hc he could have missed it in the Cottonian Library it is ha to see. As this Constitution forms one of the ma portions of Lyndwood's chapter *De Decimis*, it is given the note below.[1]

Selden, 233 [1] "Statuimus quod in cunctis Ecclesiis per Cantuariens. Provincis constitutis, uniformis sit petitio Decimarum et proventuum Eccle arum. Imprimis volumus quod decimae de frugibus, non deduc expensis, integre et sine aliqua diminutione solvantur: et de fructib arborum: et de seminibus omnibus, et de herbis hortorum nisi Pa chiani competentem fecerint redemptionem pro talibus decim Volumus et statuimus etiam quod decimae de foenis ubicunq. cresca sive in magnis pratis sive in parvis sive in cheminis exigantur, pro ut expedit, Ecclesiae persolvantur. De nutrimentis animaliu scilicet de agnis; Statuimus quod pro sex agnis et infra, sex ob dentur pro decima. Si septem sint agni in numero, septimus agn detur pro decima rectori; ita tamen quod rector Ecclesiae qui s timum agnum recipit, tres obolos in recompensationem solvat pa chiano a quo decimam illam recepit. Qui octavum recipit denarium. Qui vero nonum, det obolum parochiano vel expec rector usque ad alium annum donec plenarium Decimum agnum pos recipere si maluerit; quum ita expectat semper exigat secundi agnum meliorem vel tertium ad minus de agnis secundi anni: et l pro expectatione primi anni. Et ita intelligendum est de Deci lanae. Sed si oves alibi in hyeme et alibi in aestate nutriant dividenda est decima, Similiter si quis medio tempore emerit vel v diderit oves, et certum sit a qua parochia illae oves venerint: earund dividenda est decima sicut de re quae sequitur duo domicilia. autem incertum fuerit, habeat illa Ecclesia totam decimam infra cu limites tempore tonsionis inveniuntur. De lacte vero volumus q decima solvatur dum durat; videlicet de caseo tempore suo. Et lacte in autumno et hyeme nisi parochiani velint pro talibus fac competentem redemptionem, et hoc ad valorem decimae et commod Ecclesiae. De proventibus autem molendinorum volumus q decimae fideliter et integre solvantur. De pasturis autem et pasc tam non communibus quam communibus statuimus quod decim fideliter persolvantur: et hoc per numerum animalium et dierum expedit Ecclesiae. De piscationibus et apibus sicut de omnibus a

To Boniface undoubtedly are to be attributed the Provincial Constitutions of 1261, but their main importance is as the declaration of war with the King's Courts, and so we shall come to them when we discuss the *Articula Cleri.* 1276 A.D.

In 1276 we have the *Constitutiones Synodales Roberti Dunelmi episcopi.* These do not materially differ from the rest as to tithes, but therein for the first time it is ordained—(1) that pregnant animals are not to be taken to a neighbouring parish with a view to defrauding the parson of his tithe of young; and (2) that children's goods, when they are their own property, are to be tithed separate from their parents. Moreover we find what is henceforth common—viz., the sentences of excommunication, which Boniface had decreed generally, passed against all who in any way hinder the collection of tithes.

We next come to the Synod of Exeter in 1287, which contains a long chapter, No. LIII., *De Decimis;* and again in 1292 we have the Constitution of Gilbert, Bishop of Chichester.

In 1308 were published the Synodal Constitutions of

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bonis juste acquisitis quae renovantur per annum, statuimus quod decimae solvantur et exigantur debito modo. Statuimus etiam quod decimae personales solvantur de artificibus et mercatoribus scilicet de lucro negotiationis. Similiter de carpentariis, fabris, caementariis, textoribus, et omnibus aliis operariis stipendariis, ut videlicet dent Decimas de stipendiis suis, nisi stipendarii ipsi aliquid certum velint dare ad opus vel ad lumen Ecclesiae si rectori ipsius Ecclesiae placuerit . . . Sed quoniam inveniuntur multi Decimas sponte dare nolentes; Statuimus quod parochiani moneantur primo, secundo et tertio ut decimas Deo et Ecclesiae fideliter solvant. Quod si non emendaverint, primo ab ingressu Ecclesiae suspendantur, et sic demum ad solutionem decimarum per censuram Ecclesiasticam si necesse fuerit compellantur. Si autem dictae suspensionis relaxationem vel absolutionem petierint: ad ordinarium loci mittentur absolvendi: et debito modo puniendi Rectores autem Ecclesiarum seu Vicarii aut Capellani annui qui praedictas decimas praedicto modo propter formidinem hominum seu favorem, timore Dei postposito, ut praedictum est, cum effectu non petierint; poena suspensionis innodentur donec dimidiam marcam argenti pro sua inobedientia Archidiacono loci persolvant."—*Constitution of Robert Winchelsea.*

Henry Woodlock, Bishop of Winchester, wherein
that he finds it necessary to make special provision
the custom of the laity "decimas suas solvere contr
nisi eis prius a rectoribus convivia praeparantu
custom which is not unknown even in the present d

By the Provincial Council of Canterbury, held in
under Simon Mepha, a canon was made against a
required bribes before paying their tithes. And it i
to trace the vexed state of the relations between the C
and the judges in the elaborate denunciation an
communication of all who "malitiose attachiant ind
vel judicant attachiari," etc., for the taking of tithes.

To the same effect were the Constitutions of Archb
Stratford decreed at the Council of London in 1342.

The fifth chapter, *De silva caedua*, gives us the Cl
view of the law on the second important subject of dis

And in the beginning of the 15th century we co
the Collection of Lyndwood, which gives a concise
ment of the effect of all the canons from Stephen La
to Henry Chicheley, Archbishop of Canterbury.

J. Lyndwood was educated at Gonville Col
Cambridge, and died in 1446.

Shortly, the effect of his Collection is as follows
gives the Constitutions of Simon Mepha, two Constitu
of Archbishop Stratford, and the Constitutions of R
of Winchelsea, mentioned above. These Constitution
set out in full, with copious notes; and from these
we learn, amongst other things, that tithes, being m
spiritual, could not be held by laymen in their own r
The property in the tithes passed to the tithe owner b
separation, and there might even be a valid custom that
farmer should carry the tithe to the barn. In the abs
of special custom, the farmer could not carry unless
rector or his agent was present. A prescription no
pay or to pay less than a tenth was not good except in
case of personal tithes. Probably, owing to difficultie
ascertaining the amounts due, it had always been custom
to accept less than the proper sum for the latter, and

any case, personal tithe was to be paid only on the net profits. The list of articles which gave rise to small tithe does not disagree in any important items with the division finally established at the Common Law, by which corn, hay, and wood are great tithes, and all other predial and personal tithes are small tithes in default of special custom.

A composition for present payments was valid between a cleric and a layman, but not between two clerics, without the consent of the bishop. A composition for future payments was valid between clerics, but not between a cleric and a layman.

Tithe of animals was a predial tithe, and so was tithe of fish, if taken in a close.

Tithe of *silva caedua* was demanded without any limitation, such as was subsequently established; but apparently the Bishops in fact only claimed tithe of underwood, and of great wood no tithes were claimed. On the whole, when we remember how wide were the words as to tithe in the Laws of Edward the Confessor, and consider that this portion of the law was administered almost entirely by judges who were themselves ecclesiastical, we may well expect the Church to feel surprised at her own moderation. The Commons indeed attempted to make out in Edward III. that the Church was limited to making constitutions in accordance with the customs as to tithe already established; but this attempt failed, and therefore the limits to the rights given by the Councils must be drawn from the enactment most favourable to the Church.[1] II. Inst. 642

[1] "It was resolved by two Chief Justices and others before Parliament: (1) That a Convocation cannot assemble at their own or at the Archbishop's Convocation without the assent of the King, *i.e.* by writ. (2) That after their assembly they cannot confer together to make any canons without the license of the King. (3) When they, upon conference, conclude any canons, yet they cannot execute any of them without the Royal assent. (4) They cannot execute any after the Royal assent, but subject to the King's prerogative, common law, statute law, and custom of the realm."—*E. & Y.*, I. 192.

1250 A.D. It is possible that the very moderate character of the Church demands was due in part to the checks placed on them by the Commons and the Judges. Sure it is that the Commons and Judges thought that their efforts were needed; but from the various enactments and petitions, it is clear that neither Judges nor Commons confined their complaints to occasions when the propriety of such complaints was assured.

Book V. 5 De Exceptionibus, chap. 10 Returning to the Common Law side, we find the question of jurisdiction clearly set out in Bracton (A.D. 1246–1267):—"A prohibition will not have a place in the Court of Christianity concerning anything spiritual or annexed to the spirituality. Likewise there is no prohibition if the proceedings are concerning tithes, or if there has been an error in the form of the prohibition, as if the prohibition has been for debts when it ought to have been for chattels, or the converse: but, on the contrary, concerning tithes that a prohibition has place, if tithes are claimed or their price after a sale if they should

Chap. 16 be sold." "The jurisdiction is sometimes changed from jurisdiction to jurisdiction, the names of the things having been changed, as if from a lay chattel it has become a spiritual thing, as when things have been tithed, chattels become from a lay thing spiritual things, and so the secular jurisdiction is changed into a spiritual jurisdiction. Likewise conversely, when tithes have been sold and transferred to another person, they recommence again to be a lay chattel."

And agreeing with this is the answer given in Parliament 6 Ed. I., where the petition was for subtraction of

II. Inst. 640 tithes to be put in possession: "Rex non intromittit se de his quae taliter spectant ad forum ecclesiasticum prosequatur jus suum versus clericum coram ordinario."

But from the Constitution of Boniface of 1260, mentioned above, it appears that the clergy were not content with the jurisdiction so defined for them. For the effect of those Constitutions is to claim the trial of limits of parishes and right of patronage and many other rights for the Ecclesias-

tical Courts, and to deny the right of many of the proper proceedings of the King's Courts, and excommunications were thundered out against the judges in very far-reaching terms. Yet notwithstanding the greatness of Archbishop Boniface, the judges continued still to grant and enforce prohibitions, and so in 1267 the quarrel came to a head for the first time. The clergy exhibited many articles as grievances, called *Articula Cleri*, which are not to be found, and an Act of Parliament, called *Prohibitio formata de statuto articuli*, was passed at the beginning of the reign of Edward I. :— 1285 A.D. II. Inst. 599

"Quod cognitiones placitorum super foedalibus et libertatibus feodalium, districtionibus, officiis ministrorum . . . advocationibus ecclesiarum, recognitionibus laicum feodum contingentibus, et rebus aliis, quae non sunt de test. vel mat. ad coronam et dignitatem regiam pertineant."

After this the Clergy preferred articles *contra prohibitionem regis*, saying that: "Sub haec forma impenetrant laici prohibitionem in genere super decimis oblationibus obventionibus mortuariis," etc.; wherein they were in the right, and were so answered; and so the matter rested for the time. II. Inst. 600

Coming next to the *Statute of Westminster*, II., we find that, after providing better remedies for the owners of advowsons against those who disturbed them therein, it goes on: "And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbeys, priories, and other houses which be of the advowsons of other men that have not been used to be granted before. XIII. Ed. I. chap. 5

"And when the parson of any church is disturbed to demand tithes in the next by a *writ of indicavit*, the patron of the parson so disturbed shall have a writ to demand the advowson of the tithes being in demand; and when it is deraigned, then shall the plea pass in the Court Christian, as far forth as it is deraigned in the King's Court."

In the same year, 1285, was passed the *Circumspecte agatis*:—

1315 A.D. "The King to his Justices sendeth greeting.

Ruffhead, XIII. Ed. I., stat. 4 "Use yourselves circumspectly in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea in Court Christian of such things as be mere spiritual; that is to wit. . . If a parson demand of his parishioners oblations or tithes due and accustomed, or if any parson do sue against another parson for tithes greater or smaller, so that the fourth part of the value of the benefice be not demanded. . . .

"Item: If a parson demand mortuaries in places where a mortuary hath been used to be given. Item: If a prelate of a church demand of a parson a pension due to him, all such demands are to be made in a spiritual Court."

Under what form shall laymen purchase prohibitions generally upon tithes, oblations, etc.? The King answered, "That in tythes, oblations, obventions and mortuaries, when they be pleaded as before is said, the King's prohibition doth not lie.

"And if a Clerk or a person Religious do sell his corn being in his barn or otherwhere to any man for money, if the price thereof be demanded before a spiritual Judge, the King's Prohibition doth lie. For by the sale the Spiritual are become temporal, and so tithes pass into chattels."

And there matters rested again, the quarrel being not much abated until, in 1312, at the Parliament held at Lincoln, Walter Reynolds, Archbishop of Canterbury (whom the King, Edward II., favoured singularly for the opinion he had of his fidelity and great wisdom), preferred sixteen articles on behalf of the Clergy, and by authority of Parliament was answered, so far as directly concerns us, as follows:—

II. Inst., 619, chap. I. 9 Edward II. Statute 1: "First, whereas laymen do purchase prohibitions generally upon tythes, obventions, oblations, mortuaries, redemption of penance, violent laying hands on clerks or converts, and in cases of defamations, in which cases spiritual penance ought to be enjoined; the King doth answer to this article, that in tythes, oblations, obven-

tions, mortuaries (when they are propounded under these names), the King's prohibition shall hold no place, although for the long withholding of the same, the money may be esteemed at a sum certaine. But if a clerk or a religious man do sell his tithes being gathered in his barn, or otherwise, to any man for money, if the money be demanded before a spiritual judge, the King's prohibition shall lie; for by the sale the spiritual goods are made temporal, and the tythes turned into chattels. 1315 A.D.

"Also if debate do arise upon the right of tythes, having his original from the right of the patronage, and the quantity of the same tythes do come unto the fourth part of the goods of the Church, the King's prohibition shall hold place, if the cause come before a judge spiritual. . . . II. Inst., 620, chap. II.

"Also if any do erect in his ground a mill of new, and after the parson of the same place demanded tithe for the same, the King's prohibition doth issue in this form: II. Inst., 621, chap. V.

"Quia de tali molendino hactenus decimae non fuerunt solutae, prohibemus, etc. et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino.

"The answer—In such case the King's prohibition was never granted by the King's assent, nor never shall, which hath decreed that it shall not hereafter lie in such cases."

Chapter VI. provides that the King's Court may discuss a matter which has already been adjudged on in the Ecclesiastical Court. Chap. VI.

For, says Lord Coke, the spiritual judge's proceedings[1] are for the correction of the spiritual inner man and pro salute animae to enjoin him penance: and the judges of the common law proceed to give damages and recompense for the wrong and injury done. II. Inst. 622

Chapter VII. provides that the King's letters (*i.e.* writ), Chap. VII.

[1] The procedure appears to have been that if the party remained contumacious for forty days, the significavit of the Ecclesiastical Judge was handed in to the Petty Bag Office in the Chancery, and thereupon Process de excommunicato cap. was issued to the sheriff of any county. From that point the sheriff, until the Act of Elizabeth, acted practically as the bailiff of the Ecclesiastical Court, and if he took the body, he held it subject to the orders of that Court.

1343 A.D. shall not henceforth go to direct the ordinary to assoil an excommunicate, except in cases where it is found that the King's liberty is prejudiced by the excommunication.

Chap. XII. Chapter XII. declared that the writ de excommunicato capiendo in case of those who are of the King's tenure has not been and shall not be denied.

Chap. XIII. Chapter XIII. declared that of the ability of a parson presented unto a benefice the examination had been used to and shall in future belong to a spiritual judge.

II. Inst. 632 The words of the writ are "praesentare idoneam personam," and of this idonietas, whether as to person or conversation or ability to perform the duty, the bishop is judge.

2 Rot. Parl. 142 Selden, 288 In the Parliament of 17 Edward III., 1343, a petition was exhibited by the Commons,[1] "Que nul home soit tret en plee en Court Christian pur Dismes de bois ou de sout bois si non en lieux ou tielx Dismes soloient estre donez." And the answer was: "Soit fait de cela aussi come il ad este fait einz cez heures."

18 Ed. III. Rot. Parl. No. 9. I. b. 3 And the year following, in the next Parliament, a complaint was again exhibited by the Commons. "Item pria le Commen que come Constitution soit fait per les Prelats a prendre Disme de chescun mannere de Bois quel chose ne fuit unques usee, et que niefs et femmes poent faire testament que est contre reson, que plese per lui et per son bon conseil ordainer remedie, et que son people demoerge en meme l'estate qu'ils soloient estre en temps de touts ses progeniteurs, et que prohibitions soitent grantes à touz ceux que sont emplides de Dismes de bois sans avoir consultation." Which was answered with: "Le Roy voet que ley et reson en soient faits."

[1] There cannot be a question now, whether tithe of wood is due of common right. An argument to prove the contrary is drawn from the petition of the Commons respecting the tithes of wood in the 13th year of Edward III. The King's answer was: "Let it be done of this as it hath been done heretofore;" clearly referring to an antecedent custom; and though wood does not yield annual profits, it is not the less tithable on that account.—*J. & W.*, 523. *Page* v. *Wilson.*

In 1345 also there was passed the Exposition of 18 Ed. III. ch. 7, of Tithes. 1345 A.D.

"Item whereas writs of sci. fa.,"[1] it runs, "have been granted to warn prelates, religious and other clerks, to answer dismes in our Chancery, and to show if they have anything, or can anything say, wherefore such dismes ought not to be restored to the said demandants, and to answer as well to us as to the party of such dismes; that such writs from henceforth be not granted, and that the process hanging upon such writs be adnulled and repealed, and that the parties be dismissed from the secular judges of such manner of pleas; saving to us our right, such as we and our ancestors have had, and were wont to have of reason." 18 Ed. III. ch. 7 II. Inst. 639

The saving clause includes not only the King himself, but the King's patentee of tithes. And it was decided after the Act that the conusance of the cause for tithes belonged to Court Christian when the suit was against those that ought to have paid the tithes, but not when it was against those that were wrongful takers. II. Inst. 640

And in 32 Ed. I., in the Prior of Worcester's case, it was decided by the chancellor, treasurer, and all the judges and barons, that appropriation of tithes is no mortmaine "quia decimae sunt merae spirituales, quarum cognitio ad curiam christianitatis pertinet et non ad curiam istam." II. Inst. 640

And yet, says Lord Coke, the inference that Fitzherbert maketh that before this statute of 18 Ed. III. the right of tithes was tried in the King's Court was true, for upon a scire fac. by a spiritual person against a spiritual person, and for tithes which were spiritual, the right of tithes was tried in the scire fac. before this statute, albeit the tithes

[1] This scire fac. was not brought against the possessors of the land for subtraction of tithes but against the prelates or other clerks who took the tithes after they were severed.—II. *Inst.* 640.

Commissions out of the Chancery were directed to certain persons giving them authority to inquire whether such a spiritual person ought to have tithes of such lands whereupon inquisitions were taken and returned and on the finding a scire fac. might issue.

1351 A.D. were severed, which is now taken away in case of the scire fac. by this statute. . . . But when the right of tithes trench to the dissolution or diminution of the advowson, etc., in certain cases, the right of tithes at this day shall be tried in brevi de advocat. decimarum, and in the indicavit; but neither of these writs give any jurisdiction to the King's Court to hold plea of subtraction of tithes, but that is sent to the Ecclesiastical Court to determine.

25 Ed. III. st. 3 But with this solution the judges seem hardly to have been satisfied, for the statute 3 of 25 Ed. III., after providing that the King shall not present to a benefice in right of another without showing title, enacted (probably not without occasion):

VI. That thenceforth no judge should seize the temporalities of a bishop for contempt.

XI. That the judges should not thenceforth impeach the ordinaries nor their ministers because of indictments of extortions and oppressions unless they say and put in certain in what thing and of what and in what manner the said ordinaries or their minister have done extortions or oppressions.

And so this half of the conflict seems to have been decided, but the subject of what woods were tithable was still vexed, and therefore in the Parliament of 25 Ed. III. the Commons exhibited the following petition:

Rot. Parl. 25 Ed. III. No. 27 "Item pria le Commone, que si la clergiee in droit des Dismes de haut bois et sout bois ou d'autre chose riens demandent ou attemptent de nouvel forsque solement ceo et en les lieus d'ont ils ont este d'anciens temps seisis come en le droit de lour Eglises, que pleise a notre Seigniour le Roy ent granter prohibition sans consultation a touz ceux que le voillent demander en tiel cas, et que les dites gents de St. Eglise soient defendus a demander Dismes de grosse bois."

Here the Commons would have had such a liberty of discharge of tithes not usually paid, as the Philippine in France and the like edicts of some other nations give the

subject. But the answer was: "Le Roy & son conseil se voillent de ceste Petition aviser." 1371 A.D.

But upon new Petition by the Lords Temporall and Commons in the Parliament of 45 Ed. III. it was enacted: 45 Ed. III. ch. 3

"Item, at the Complaint of the Great Men and Commons, showing by their Petition, That whereas they sell their great Wood of the Age of twenty Years, or of forty Years, or of greater Age, to Merchants to their own Profit, or in Aid of the King in his Wars, Parsons and Vicars of holy Church do implead and draw the said Merchants in the Spiritual Court for the Tithes of the said Wood, in the Name of this Word called Sylva caedua, whereby they cannot sell their Woods to the very Value to the great Damage of them and of the Realm. It is ordained and established that a Prohibition in this Case shall be granted, and upon the same an Attachment, as it hath been used before this Time."[1]

But the clergy under pretence that this was not a statute, but only an ordinance, ofttimes afterwards brought the temporality in question upon their canons: "insomuch that in the parliament of 47 Ed. III. a bill was put in by the Commons, reciting that of 45 Ed. III., and then relating, that les persons de Seint Eglise entendants que cel Ordinance ne restreint my lour aunciene accrochements, surmettants que ce ne fuitt my afferme pur Estatut, font occasions in Court Christien a contrarie del Ordinance suis dit a grant damage del people, per qui pleise a notre Seignior le Roy d'affermer la dite Ordinance pur Estatut a durer pur temps avener, et que Prohibition especiall sur meme lestatut de ceo soit fait en lo Chancellarie defendant que eux ni teignent plee en Court Christien des dismes de bois del age avant dit, that is; of XX. yeers. The answer hereto was, Soit title Prohibition grantee come ad este use d'auncien temps. Which answer being compared with the conclusion of the act of 45 Ed. III. hath Selden, 240

[1] It is now clear, whatever doubts may formerly have been entertained, that the tithe of wood is due by the common law as much as any other tithe.—*J. & W.* 521. *Page* v. *Wilson.*

1384 A.D. given such an end to both these points, as no question hath been made thereof at any time since." [1]

II. Inst. 645 Selden, 241 In the Parliament held at Salisbury in the seventh year of Richard II. (the date shown by Lord Coke), it was agreed coram concilio regis quod consultationes fieri debent de sylva cadua, eo non obstante, quod non renovatur per annum, et super hoc facta fuit quaedam consultatio pro abbate de Netley, de sylva caedua.

And it appears that in accordance therewith the procedure was that a prohibition was granted, De catallis et debitis quae non sunt de testamento et matrimonio: thereon there might be a consultation, De sylva caedua, but in that consultation was a retraint in these words: dummodo tamen de grossis arboribus in hac parte non agatur. And so the remaining matter in dispute was settled.[2]

15 Ric. II. ch. 6 In the fifteenth year of Richard II. was passed an Act, chap. 6, for making provision for the Poor and the Vicar in the appropriation of Benefices. It provides that in every license from henceforth to be made in the Chancery of the Appropriation of any Parish Church, it shall be expressly contained and comprised that the Diocesan of the Place

[1] So says Lord Coke, but the Commons appear to have thought otherwise, as we find complaints by them against the clergy concerning Sylva caedua in 1379 and again in 1385, in 1391, 1392, and other years, 1401 and apparently for the last time in 1433. In the complaint of 2 Ric. II. the Commons say that tithe of all manner of wood is demanded, and pray that it be ordained to be only payable of underwood or wood of a certain age under ten years, for they say before the first pestilence no tithes of any manner of wood were given, granted or demanded.

[2] But still the Church did not always get her rights, for in 1400 we find an article of complaint against Richard II. at his deposition: "Item when parties contending in the Spiritual Court had endeavoured to obtain the King's prohibitions to impede legal process, and the Chancellor had justly refused to grant them: yet the King, by letters under his signet, frequently strictly prohibited the Ecclesiastical Judges from proceeding in such cases: wickedly infringing the liberties of the Church approved of in Magna Charta which he had sworn to observe, and damnably incurring the sentence of excommunication pronounced against such idolaters by the Holy Fathers."—13 *Rot. Parl.* 421.

upon the Appropriation of such Churches shall ordain, according to the value of such Churches, a convenient sum of money to be paid and distributed yearly of the Fruits and Profits of the same Churches, by those that shall have the said Churches in proper use and by their Successors, to the poor Parishioners of the said Churches, in Aid of their living and sustenance for ever, and also that the Vicar be well and sufficiently endowed. 1394 A.D.

The religious houses were wont to depute someone to perform service, and to administer the sacraments, in those parishes of which the society was itself the parson. This officiating minister was called the vicar. His stipend was at the discretion of the appropriator, who was, however, bound of common right to find somebody qui illi de temporalibus, episcopo de spiritualibus debeat respondere. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators that the legislature interposed, and accordingly passed the statute just described. Already some of the provincial councils had made similar provision for their own clergy; but probably with little effect as the appointment of vicars as a rule rested with the monasteries. Blackstone's Com. I., 384, et seq.

It had, however, not always been the case that the salaries of vicars required artificial support, for a statute in 1363 provided that, "owing to priests having become very scant, nobody should pay to any Priest yearly more than five marks, nor pay to such Priest retained to abide at his table, more than two marks for his gown and other necessaries, and his Table accounted to XL. shi." 36 Ed. III. ch. 8

However, even after the Act just cited, the vicar being liable to be removed at the pleasure of the appropriator was not likely to insist too rigidly on the legal sufficiency of the stipend. Hence the Statute of 4 Henry IV. chap. 12 became necessary. This confirmed the previous statute of 15 Richard II., and provided for the due enforcement thereof, and ordained that from thenceforth in every church so appropriated or to be appropriated, a secular 4 Hen. IV. ch. 12

1402 A.D. person be ordained Vicar perpetual canonically institute and induct in the same and covenably endowed by the Diocesan of the Ordinary to do Divine Service, and to inform the people and to keep hospitality there, and that no Religious be in any wise made Vicar in any Church so appropried or to be appropried in time to come.

2 Hen. IV., ch. 4 In 2 Hen. IV. an Act, ch. 4, was passed which recites complaints that the order of Cistersceaux in England had purchased Bulls to be quit and discharged to pay the tithes of their Lands, Tenements, and possessions let to Ferm or manured or occupied by other persons than themselves, and enacts that the Religious persons of the order of Cistersceaux shall stand in the estate that they were before the time of such Bulls purchased; and that as well they of the said order as all other Religious and Seculars, of what estate or condition they be, which do put the said Bulls in execution or from henceforth do purchase other such Bulls of new, or by Colour of the same Bulls purchased or to be purchased do take advantage in any manner, that process shall be made against them by garnishment of two months by writ of praemunire facias; and if they make default or be attainted then they shall incur the pains and forfeitures contained in the Statute of provisors.

II. Roll. 479–481. After Pope Pashal at the Council of Mentz ordained that monks "should not pay tithes on their labours, that continued a general discharge until the time of Henry II., when Adrian restrained it to three orders, the Cistercians, Templars, and Hospitallers.[1] As to the rest, they paid no tithes de animalibus nutrimentis annuatim . . . et gratis, but for other things they paid tithes de animalibus." But in addition to this, the Popes used to grant new Bulls of discharge to this or that monastery or order at pleasure. Thus, Innocent III., who granted the discharge to the Praemonstratenses which came in question in the case cited from II. Rolle, also granted a similar discharge to

[1] And to these orders it was specially allowed by the General Council of Lateran held in 1215.—*Selden*, 406.

the Abbey of Chertsey. What force they had in the Common Law Selden declines to say, and it is perhaps unnecessary to inquire; for they had their force in the Canon Law, and being so allowed in allegations against libels for tithes, were strengthened also at length by prescription of time, insomuch that from them divers lands of dissolved monasteries remain to this day discharged of payment. 1402 A.D. Selden, 406

Meanwhile the Commons had found a fresh subject of complaint against the Church, and in 5 Hen. IV., presented a bill against the exaction of "Tithes of quarries of stone and slate." 3 Rot. Part. 540

Hereto the answer was, "Le Roy s'advisera;" and it was decided in Lyss *v.* Wats,[1] and is now clear law that such tithes are not payable. Moore, K. B. 908

In the reigns of Richard II. and Henry IV., the contest with the Papacy as to Church revenues gave rise to many statutes.

As early as 1307 a petition of Parliament had been presented (and, according to the recital in 13 Rich. III. sect. 2 chap. 2, made a statute) reciting, "The Holy Church of England was founded in the Estate of Prelacy within the realm of England by the King and the barons to inform them and the people of the Law of God, and to make hospitalities, alms, and other works of charity in the places where the churches were founded for the souls of the founders, their heirs, and all Christians; and certain possessions, as well in fees, lands, rents as in advowsons, which do extend to a great value, were assigned to the Prelates and other people of the Holy Church of the said realm, to sustain the same charge;" and complaining that the Pope bestowed spiritual livings upon aliens, and reserved to himself the first-fruits, and praying for remedies. (Statute recited in) 13 Rich. III. s. 2, c. 2

And in 1350 the *Statute of Provisors* was passed, which recited these evils, and provided that when the Pope made any Collation or Presentment, it should be void, and the 25 Ed. III. st. 4

[1] "Que dismes ne sont due de slates ne quarries de slate ou cole." —*Lyss* v. *Wats.* Moore, K. B. 908.

A.D. 1400 right of electing or presenting should go to the patron or the King, as the case might be, and penalties were enacted against those who disturbed the presentees of the King or of such patrons.

13 Rich. II. c. 2 And this statute was confirmed by the Statute of 13 Rich. II., and additional penalties were provided against those who accepted benefices contrary to the said statute.

3 Rich. II. c. 3 In addition to these, the Statute 3 Rich. II. c. 3, recites that benefices were intended to be given to honest and meet persons of the realm, to serve and honour God diligently, and also to keep hospitality, and to inform and teach the people, and to do other worthy things pertaining to the cure of souls, and describes the great evils caused by the giving of benefices to aliens, and provides that none shall take in ferm any benefice of an alien without the King's consent, and that none shall convey money out of the realm for such ferm. This statute was confirmed in 7 Rich. II., and again in 16 Rich. II.; and by this last Act provision was made against purchasing bulls from Rome.

7 Ric. II. c. 12
16 Ric. II. c. 5

5 Hen. IV. c. 11 In 5 Hen. IV. an Act was passed which ordained that the fermors and all manner of occupiers of the manors, lands, tenements, and other possessions of aliens shall pay and be bound to pay all manner of dismes thereof due to parsons and vicars of Holy Church in whose parishes the same manors, lands, tenements, and possessions be so assessed and due, as the Law of Holy Church required, notwithstanding that the said manors, etc., be seized into the King's hands, or notwithstanding any prohibition made or to be made to the contrary.

7 Hen. IV. c. 6 And in 7 Hen. IV. the Commons prayed against bulls against tithes; and the answer was: "The King wills that no person put in execution any such bull under the penalties provided against the Order of Cistercians."

I. Hen. V. c. 7 In 1 Hen. V. the Statute of 3 Rich. II. c. 3 was confirmed; and there the matter appears to have rested, with the exception of the grant of the alien priories to the Church in 19 Hen. VI., until, in the reign of Henry VIII., all

pretensions of Rome and of the alien patrons were finally disposed of. 1415 A.D.

The judges do not seem to have always oppressed the Church unduly, for in 2 Hen. V. we find the Commons complaining that the judges differed in interpreting the Statute *De sylva caedua;* and in 10 Hen. VI. they actually complained that writs of prohibition in cases *De sylva caedua* were refused in the Chancery, and the answer was, "Let the Statute be kept." 2 Hen. V. R. P. 7 10 Hen. VI. R. P. 17

Moreover in that same year, 1415, the spiritual judges appear to have been rather too tenacious of their rights, as appears from the Act, which provides that the Spiritual Court is to grant a copy of the libel to be used on the application for a prohibition. And this is practically the last we see of the fight with the Courts for the present. 2 Hen. V. c. 3

Looking at the contest as a whole, the Church might have fairly claimed the victory. So far as the contest with the judges is concerned, her courts have retained the whole of the jurisdiction as to tithe which they exercised at the time of the Charter, and have possibly regained, and certainly secured that portion which related to claims disputed by parishioners.

Turning to the fight with the Commons, the victory was even more complete. It does not appear that the Bishops ever insisted on a right to have tithe of gross boyes, so that practically all that the Commons did was to check improper exercise of Ecclesiastical jurisdiction, a duty which the Courts could equally well have performed.

But the Law of Tithes had survived an even greater peril.

Beginning about the year 1221 A.D., the Dominicans and Franciscans continuously preached that tithes were mere alms: they accepted the doctrine of the Schoolmen that some portion was due to God *jure divino;* but that what that portion was, and to whom to be paid, were fictions of the Ecclesiastical law. Thus the mendicants especially often got them to themselves as alms, to be arbitrarily disposed of to such as took up any spiritual Selden, 166

1390 A.D. labour. Against their taking of parochial tithes, a canon was made in the General Council of Vienna in 1340, and bitter complaints were heard against them for teaching that the command of tithes was not moral but ceremonial, and that out of what was given to any of the four orders of mendicants, no tithe was in conscience to be deduced for the ministers. That there was reason to protest against the uses to which tithes were sometimes put, appears in
Selden, 106 1330 from the petition to Parliament, 50 Ed. III. art. 94: "That aliens (which by reason of appropriations made to their houses beyond the seas, or to their priories or cells in this kingdom or the like) did so devour the salaries due to parish curates, and so neglect the Divine service, which they should have taken care for in every parish, that they did more harm to the Holy Church than all the Jews and Saracens of the world." So also the description in Chaucer's "Friar's Tale"—

"And small tithes they were foule yspent"—

shows that even amongst the inferior clergy they were not less misused.

And so Wyclife shows in his complaint to the King and Parliament under Richard II.:—

"A Lord God, where this be reason to constrain the poor people to find a worldly priest, sometime unable both of life and cunning, in pompe and pride, covetise and envie, glottonie, drunkennesse and lecherie, in simonie and heresie, with fat horse, and jolly and gay saddles and bridles ringing by the way, and himself in costly clothes and pelure, and to suffer their wives and children, and their poor neighbours, perish for hunger, thirst, and cold, and other mischiefes of the world. A Lord, Jesu Christ, sith within few yeares, men payed their tithes and offerings at their own will free to good men, and able to great worship of God to profit and fairnesse of Holy Church fighting in earth. Where it were lawful and needful that a worldly priest should destroy this holy and approved custom, constraining men to leave this freedome, turning tithes and offerings into wicked uses."

And Wyclife maintained that tithes were mere alms, and that parishioners might "ad libitum suum eas auferre propter peccata suorum praelatorum." 1426 A.D.

But Wyclife passed away, and for the Church more peaceful times were in store. When William Russel, a Franciscan, was, in 1472, accused in Convocation of preaching that Personal Tithes were not necessarily payable by God's commandment, but that every man might dispose of them at his pleasure to charitable uses, he was promptly enjoined to recant at Paul's Cross, and before the day named fled the kingdom. And thereupon Oxford—the Oxford which no long time before had listened to Wyclife—sent to Convocation the famous letter in support of Personal Tithes:—

"Dicimus et firmiter concipimus quod Decimae personales tam ex praecepto juris divini quam sanctorum Patrum traditionibus sub auctoritate Ecclesiae in concordi juris judicio debentur Ecclesiis et earum Ministris curam animarum habentibus et Sacramenta ministrantibus ex auctoritate Ecclesiae;" and then follow many vehement denunciations of the doctrine complained of. Russel was followed to Rome, and there accused and imprisoned; but breaking prison, he returned home, and was compelled to recant at Paul's Cross; and there, when nothing else would satisfy the secular part of the Clergy, he solemnly abjured his heresy, "as they called it," as Selden remarks, with a bitterness which was a foretaste of what was to come. Selden, 172

Perhaps the strongest point which the advocates of Tithe could have on which to support their case is, that during all this period, when lawyers were drawn into argument after argument as to the rights of the Church, when the Commons were dead against her, while this controversy raised by the Friars was being contested in the universities and throughout the kingdom, and while the exactions of Rome were driving the country to desperation, not once does it appear that any judge (and the judges were certainly not prone to take the clerical side) suggested that there was any flaw in the title of the Church to ordinary Tithes.

CHAPTER V.

FROM THE DISSOLUTION OF THE MONASTERIES TO THE REVOLUTION.

A.D. 1530 THE next change of importance does not occur until the reign of Henry VIII. A King who, having succeeded in absolutely eliminating the jurisdiction of the Pope and in extracting a fine (equivalent to a million sterling of present money) from the Clergy, was on his way to appropriate another property with a revenue of £143,000, might fairly be expected to treat with consideration the Church which, on the whole, had supported him. Especially may we expect that one who was at once selfish and generous should be willing to pass enactments which, while materially assisting that Church, could cost him nothing: and so it proved. At an earlier stage, however, the enactments under Henry VIII. were by no means favourable.

21 Hen. VIII. c. 6 In 1530, a statute was passed which provided that "no parson, vicar, or parish priest, nor other spiritual person, nor their fermors, bailiffs nor lessees should take nor convent before the judge any person for any mortuary or corse present more than was therein ordained."

23 Hen. VIII. c. 9 In 23 Hen. VIII. it was enacted "that persons were not to be cited for tithes out of the jurisdiction wherein they dwelt."

24 Hen. VIII. c. 12 In 1533 was passed a Statute for the restraint of Appeals, which recites the evils of appeals to Rome, and provides that all causes testamentary and matrimonial, causes of tithes, oblations and obventions (the knowledge whereof, by the goodness of Princes of the Realm and by the Laws and Customs of the same, appertaineth to the Spiritual jurisdiction of this realm), shall thenceforth be definitely

determined within the jurisdiction. And the final appeal was to be to the Archbishop or, in cases which might touch the King, to Convocation. A year later the Clergy were debarred from making fresh canons; and provision was made for a body of thirty-two persons to examine the canons, and it was enacted that no canons should be put in execution which were contrary to the Royal prerogative or the customs, laws or statutes of the realm.[1] 1536 A.D. 25 Hen. VIII c. 19

It was further provided that there should be an appeal from the Archbishop to the King's Court of Chancery, and that a Commission should issue under the Great Seal to hear such appeal, as in Admiralty causes, and the Commissioner's judgment was to be final.

The question of jurisdiction having been thus settled, the Statute 27 Henry VIII. was passed:— 27 Hen. VIII. c. 20

"For tithes to be paid throughout this Realm. Forasmuch as divers numbers of evil-disposed Persons inhabited in sundry Counties, Cities, Towns and Places of this Realm, having no Respect to their Duties to Almighty God, but against Right and good Conscience have attempted to subtract and withhold in some Places the whole, and in some Places great Parts of their Tithes and Oblations, as well personal as predial, due unto God and Holy Church; and, pursuing such their detestable Enormities and Injuries, have attempted in late Time past to disobey, contemn and despise the Process, Laws and Decrees of the Ecclesiastical Courts of this Realm, in more temerous

[1] In 1537 the power of Rome over tithes in England was finally extinguished by a Statute which provided that all bulls and dispensations obtained from Rome should thenceforth be clearly void, and should not be used under the penalties of the *Statute of Praemunire*. This is a general law, and plenarily and strictly framed against all bulls, etc. True it is that there are some exceptions in the Act, but there is no exception for any dispensation of nonpayment of tithes. "And we are of opinion," says Lord Coke, "that the Pope by his bull could not discharge any subject of this realm of payment of tithes, for it should be against the liberty of the subject, when he had liberty to grant his tithes to what spiritual person he would, and against the rights of the persons, etc., of parishes after parochial rights were established." 28 Hen. VIII. c. 16

1536 A.D. and large Manner than before this time hath been seen: For Reformation of which said Injuries, and for Unity and Peace to be preserved amongst the King's Subjects of this Realm, our Sovereign Lord the King being supreme Head on Earth (under God) of the Church of England, willing the spiritual Rights and Duties of that Church to be preserved, continued and maintained, hath ordained and enacted by Authority of this present Parliament, That every of his Subjects of this Realm of England, Ireland, Wales and Calais, and Marches of the same, according to the Ecclesiastical Laws and Ordinances of his Church of England, and after the laudable Usages and Customs of the Parish or other Places where he dwelleth or occupieth, shall yield and pay his Tithes, Offerings and other Duties of Holy Church, and that for such subtractions of any of the said Tithes, Offerings or other Duties, the Parson, Vicar, Curate, or other Party in that Behalf grieved, may by due Process of the King's Ecclesiastical Laws of the Church of England convent the Person or Persons so offending before his Ordinary, or other competent Judge of this Realm having Authority to hear and determine the Right of Tithes, as also to compel the same Person or Persons offending to do and yield their said Duties in that Behalf. And in case the Ordinary of the Diocese, or his Commissary, or the Archdeacon or his Official, or any other competent Judge aforesaid, for any Contempt, Contumacy, Disobedience or other misdemeanour of the Party Defendant, make Information and Request to any of the King's most honourable Council, or to the Justices of the Peace of the Shire where such offender dwelleth, to assist and aid the same Ordinary, Commissary, Archdeacon, Official or Judge, to order or reform any such Person in any Cause before rehearsed, that then he of the King's said honourable Council, or such two Justices of the Peace, whereof the one to be of the Quorum, to whom such Information or Request shall be made, shall have full Power and Authority, by Virtue of this Act to attach or cause to be attached, the Person or Persons against

whom such Information or Request shall be made, and to commit the same Person or Persons to ward, there to remain without Bail and Mainprize, till that he or they shall have found sufficient surety, to be bound by Recognizance or otherwise before the King's said Councillor, or Justice of the Peace, or any other like Councillor, or Justice of Peace, to the Use of our said Sovereign Lord the King, to give due Obedience to the Processes, Proceedings, Decrees and Sentences of the Ecclesiastical Court of this Realm, wherein such Suit or Matter for the Premisses shall depend or be. And that every of the King's said Councillors, or two Justices of the Peace, whereof the one to be of the Quorum, as is aforesaid, shall have full Power and Authority, by Virtue of this Act, to take, receive and record Recognizances and Obligations in any of the Causes above written." 1536 A.D.

To the Church, as has been seen, no vital injury had resulted from the agitation begun by the Friars and continued by Wyclife and Erasmus and their adherents; but it was to prove otherwise with the monastic orders. From the first they had, as a whole, repelled the great religious movement of the fifteenth century with unswerving obstinacy; they had not even yielded to the extent of permanently reforming some of the abuses which had been so freely and so bitterly denounced. The monks had become mere landowners, often anxious only to enlarge their revenues and to diminish the numbers of those who shared them.[1]

So far back as the 13th century, King John and Edward I., and yet again in 1337, Edward III., had confiscated the alien priories, as those Houses were called which were dependencies of foreign monasteries; and the last-named let out their lands and tenements until the peace with France in 1361, when he restored their estates; and similar raids were made on them again in his reign

[1] The number of houses overthrown by the two Acts of 1536 and 1538 was—186 Benedictines, 173 Augustinians, 101 Cistercians, 33 Friaries, 32 Praemonstratensians, 28 Knight Hospitallers, etc.: total, 616. Total revenue, £142,914 12*s.* 4*d.*

1536 A.D. and in that of Richard II. Henry IV. showed them more favour, but in 1410 the House of Commons proposed the confiscation of all the temporalities held by bishops, abbots and priors; and although this scheme was dropped, yet in 1416 Parliament dissolved all the alien priories and vested their estates in the Crown. They were for the most part applied to ecclesiastical purposes, but some portion at any rate passed into private hands. Hence Wolsey in 1523 found but little opposition when he obtained bulls to suppress thirty small monasteries, and to apply the revenues to educational purposes.

And when in 1536 Cromwell despatched Legh and Leyton as Royal Commissioners on a general visitation of the religious houses, the "Black Book" which they collated, full of horrors as it was, easily alienated from the monks what little sympathy was still felt for them. The complete dissolution of the monasteries did not follow at once, for after a bitter debate in the Commons, it was agreed to confine the suppression to Houses whose income fell below £200. The Act 27 Henry VIII., after reciting

27 Hen. VIII. c. 28 the sinful uses to which the properties of the smaller Houses were put, provides "that the King shall have (*inter alia*) all the Tithes, Pensions, Portions, Churches, Chapels, Advowsons and Patronages appertaining or belonging to every such Monastery, Priory, or other Religious House not having above the clear yearly value of 200 pounds, in as large and ample manner as the Abbots, Priors and other Governors now have or ought to have the same in right of their Houses. And that the King should also have all such Monasteries, Abbeys and Priories which at any time within one year before the making of the Act had been granted to the King under the Covent Seal by any Abbot or Prior, or that otherwise had been suppressed or disendowed, to have and to hold the Premises, with all their Rights, Profits, Jurisdiction and Commodities unto the King and his Heirs and Assigns for ever, to do and use therewith his and their own wills, to the Pleasure of Almighty God and to the Honour and Profit of this Realm."

The Act further provides that all Persons or Bodies having Letters Patent of any of the property shall hold according to the tenor of such Letters Patent, and have such rights for anything contained in such Letters Patent as the Governors of the Religious Houses would have had. 1540 A.D.

Section 3 saves to all persons (other than the governors patrons of the said Houses) all such rights as they might have had to (*inter alia*) tithes appertaining or belonging to any of the said Houses.

Sections 7 and 8 saved the rights of other Houses in separate cells, and the rights of founders and patrons.

Section 9 provided that every person or body to whom the King should grant the site of any of the Houses suppressed was bound, under a penalty of £6 13*s.* 4*d.*, to keep an honest continual house and household in the same site or precinct, and to occupy as much of the demesne in husbandry as the Houses or their farmers had occupied within twenty years previously.

But the respite for the greater monasteries was a short one, for in 31 Henry VIII., by c. 13, they too were dissolved in words which, so far as we are concerned, do not differ materially from the earlier Act, with the exception of one important section—viz., the 20th. This section provides that such of the possessions of the said late monasteries, priories, nunneries, colleges, etc., as were before the dissolution discharged of tithe, were still to continue so discharged. 31 Hen. VIII. c. 13

The importance of this provision is seen from the decision in Sydoun *v.* Holmes, whence it appears that at common law, in cases to which the statute does not apply when the body enjoying an exemption was dissolved, the privilege was gone. Cro. Car. 422 2 Gwilt. 479

In the ensuing year, 32 Henry VIII., was passed an Act for the true payment of tithes and offerings. After reciting that people more than in times past refused to allow their tithes to be collected, and that they were encouraged thereto, for that divers lay persons having parsonages, vicarages and tithes cannot sue in any Eccle- 32 Hen. VIII. c. 7

1541 A.D. siastical Court for the wrongful withholding of the said tithes, nor cannot by the order of the common laws have any due remedy against any person or persons that wrongfully detain or withhold the same, whence much controversy, suit, variance, and discord was likely to ensue, it provides:

"(1) That every person shall set out, yield, or pay all tithes according to the lawful customs and usages of the Parishes and places where such tithes shall grow, arise, come or be due; and that any person, ecclesiastical or lay, being wronged, may convent any person withholding or obtaining any part of the tithes before the ordinary, his commissary, or other competent minister or lawful judge of the place where such wrong shall be done, according to the ecclesiastical laws; and the ordinary, commissary, competent minister or other judge was to hear and determine and give sentence according to the course and process of the said law, and in case of an appeal was to adjudge the costs already incurred, and take security for them. Upon information, certificate, or complaint in writing to them by the said Ecclesiastical Judge that the party wilfully refused to pay the tithes or other sums of money adjudged, two Justices of the Peace were to commit the party until he found sureties to perform the sentence."

Lay proprietors of tithes, if kept from their possession by any person claiming an interest therein, were to have their remedy in the Temporal Courts as of lands; but this was not to extend to any person who refused to pay or set out tithes, in which case the remedy was in the Ecclesiastical Court.

32 Hen. VIII. c. 7 And by the 5th Section it was provided that no person should be otherwise compelled to yield or pay any tithes for any manors, lands, tenements or hereditaments which by the laws or statutes were discharged, or not chargeable for payment of any such tithes.

2 & 3 Ed. VI. c. 13 To these two Acts of 27 and 32 Henry VIII. an addition was made in the Statutes 2 & 3 Ed. VI.

After reciting that in the said Acts many things which were convenient had been omitted, it confirms the said Acts, and provides in addition that every person shall thenceforth truly and justly, without fraud or guile, divide, set out, yield and pay all manner of their predial tithes in their proper kind, as they arise and happen, in such manner and form as hath been of right yielded and paid within forty years[1] next before the making of the Act, or of right or custom ought to have been paid. And that no person should carry away any such or like tithes before he had justly divided or set forth for the tithe thereof, the tenth part of the same or otherwise agreed for the same tithe with the parson, vicar or other owner, proprietor or farmer of the same tithe under the pain of forfeiture of treble value of the tithes so taken or carried away.[2] 1549 A.D.

The provision which renders the tithe payer liable to a penalty if he do not set forth truly, without fraud or guile, is perhaps the most effective version of the ecclesiastical doctrine that we have yet seen. For the first time we now have that enacted in plain terms which the Church had all along fought for—viz., that the nature of tithes is such that it is an offence on the part of the individual to attempt to evade payment of them.

"And be it enacted that at all times whensoever and as often as the said predial Tithes shall be due and at the Tithing Time of the same, it to be lawful to every Party to whom any of the said Tithes ought to be paid, or his deputy or servant, to view and see their said Tithes to be justly and truly set forth and severed from the nine parts, and the same quietly to take and carry away: And if any Person carry away his corn or hay, or his other predial

[1] "The period of forty years is chosen because it is the usual time for the proof *de modo decimandi*."—*II. Inst.* 649.

[2] "On the words of the section it was decided in Hil. 29 Eliz., that whensoever a forfeiture is given against him that doth dispossess an owner of his property, as here of his tithes, then the forfeiture is given to the party grieved, and not to the King, and the rather for that this is an additional law and made for the benefit of the proprietor of the tithes."—*II. Inst.* 650.

1549 A.D. Tithes, before the Tithe thereof be set forth; or willingly withdraw his Tithes of the same or of such other things whereof predial Tithes ought to be paid; or do stop or let the Parson, Vicar, Proprietor, Owner or other their Deputies or Farmers, to view, take and carry away their Tithes as is abovesaid, by reason whereof the said Tithe or Tenth is lost, impaired or hurt; that then, upon due proof thereof made before the Spiritual Judge or any other Judge to whom heretofore he might have made complaint, the Party so carrying away, withdrawing, letting or stopping shall pay the double value[1] of the Tenth or Tithe so taken, lost, withdrawn or carried away, over and besides the costs, charges and expenses of the suit in the same: The same to be recovered before the Ecclesiastical Judge according to the King's Ecclesiastical Laws."

II. Inst. 649 The first part of the section is declaratory of the Common Law, because for the stopping of his way, etc., an action of the case did lye at the Common Law.

Sect. 3 "And be it enacted, That all and every Person which hath or shall have any beasts or other cattle titheable, going, feeding or depasturing in any Waste or common Ground, whereof the Parish is not certainly known, shall pay their Tithes for the increase of the said Cattle so going in the said Waste or Common, to the Parson, Vicar, Proprietor, Portionary Owner, or other their Farmers or Deputies of the Parish, Hamlet, Town or other Place, where the Owner of the said Cattle inhabiteth or dwelleth." Where the King ought to have the Tithe, within the Waste or Common in his Forests, which are not within any Parish, this branch gives the Tithes of the increase of cattle to the Parson of the parish where the owner dwells.

Sect. 4 "Provided, etc., that no Person shall be sued or otherwise compelled to yield, give or pay any manner of Tithe, for

[1] "The double value is named because the tithe itself is also recoverable in the Spiritual Court, so that the penalties in the two sections are equal, but still the suit in the Spiritual Court is more advantageous, because there costs are given under sect. 2, and none would be given at the Common Law."—*II. Inst.* 651.

any Manors, Lands, Tenements or Hereditaments, which by the Laws and Statutes of this Realm, or by any Privilege or Prescription,[1] are not chargeable[2] with the payment of any such Tithes, or that be discharged by any Composition real." 1549 A.D.

The time for prescription by the Canon Law is forty years, by which time of prescription a spiritual person may gain by the Canon Law a right of tithes in another parish. But this Canon being against the Common Law, which alloweth no prescription unless it be time out of mind, never had allowance in England. A composition real must be either before time of living memory, or if within time, then by parson, patron and ordinary.[3]

"That all such barren heath or waste ground, other than such as be discharged for the payment of Tithes by Act of Parliament which before this time have lain barren and paid no Tithes by reason of the same barrenness, and now be or hereafter shall be improved, and converted into arable ground or meadow, shall from henceforth, after the end and term of seven years next after such improvement fully ended and determined, pay Tithe for the corn and hay growing upon the same; anything in this Act to the contrary in any wise notwithstanding. Sect. 5, 6 2 & 3 Ed. VI., c. XIII. sect. 5

"That if any such barren, waste or heath ground, hath before this time been charged with the payment of any Tithes, and that the same be hereafter improved or con-

[1] "Prescription," *e.g.*, *modus decimandi*, lands given in satisfaction, etc. And a country may prescribe to be quit of tithes or in *non decimando*.—*II. Inst.* 652.

[2] "Tithes shall not be paid of any thing that is of the substance of the earth and not annual, as coals, turf, etc., nor of beasts that be *ferae naturae*, nor of agistment of such beasts as pay tithe, nor of cattle that manure the ground, but of barren beasts the Parson shall have tithe for agistment or herbage, unless they be nourished for the plough and so employed. No tithe shall be paid for after pasture, nor for rakings, nor for *sylva caedua* employed for hedging or for repairing of plough, and two tithes shall not be paid of one land in one year, but if the soil of an orchard be sown with grain, tithes of the fruit and of the grain are paid, for they are of distinct kinds."—*II. Inst.* 652.

[3] Where a modus or custom has once been established, it is not lost by recourse for any limited period to payment in kind.

Sect. 6 verted into arable ground or meadow, that then the Owner or Owners thereof shall, during seven years next following from and after the same improvement, pay such kind of Tithe as was paid for the same before the said improvement; anything in this Act to the contrary in any wise notwithstanding.[1]

"That every Person exercising merchandises, bargaining and selling clothing, handicraft or other art or faculty, being such kind of persons and in such places as heretofore within these forty years have accustomably used to pay such personal Tithes, or of right ought to pay (other than such as be common day-labourers), shall yearly, at or before the Feast of Easter, pay for his personal tithes the tenth part of his clear gains, his charges and expenses, according to his estate, condition or degree, to be therein abated, allowed and deducted.

Sect. 9 "That in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes to be observed and to continue; anything in this Act to the contrary notwithstanding.

"That if any Person refuse to pay his Personal Tithes in form aforesaid, that then it shall be lawful to the Ordinary of the same Diocese where the Party that so ought to pay the said Tithes is dwelling, to call the same Party before him, and by his Discretion to examine him by all lawful and reasonable Means, other than by the Parties own corporal Oath, concerning the true Payment of the said Personal Tithes."

It has already been pointed out that the main difficulty in the exaction of personal tithes is the want of any method of discovery.[2]

From the Constitution passed in 1236, it appears that, by the custom of England, *juramentum calumniae* was not to be

[1] "The 6th section shows that barren does not mean absolutely barren, but barren *quoad agriculturam*. By implication no tithe, except under sec. 6, is to be paid during the seven years."—*II. Inst.* 653.

[2] There may be a *modus decimandi* for personal tithes.

ministered; but the custom was not in fact so general as is here alleged, for lay men were free by the custom for taking the oath except in causis matrimonialibus et testamentariis and in those two cases the ecclesiastical judge might examine the parties upon oath as appears from a prohibition by authority of parliament to the Sheriffs "quod non permittant quod aliqui laici in baliva sua in aliquibus locis conveniant ad aliquas recognitiones p. sacramenta sua facere, nisi in causis matrimonialibus et testamentariis."— It was naturally easy for a Court having a limited power of administering oaths to do so in individual instances outside that limit, and probably the Church Court utilised in the same way the Statute 2 Hen. IV., ch. 15, whereby it was enacted: quod diocesanus per se vel commissarios suos contra hujusmodi personas etc. ad omnem juris effectum publice et judicialiter procedat et negotium hujusmodis terminet juxta canonicas sanctiones. But this was repealed by 25 Hen. VIII. ch. 14, and thenceforth the ordinary had no jurisdiction to administer the oath as further appears from the words in the Statute.

II. Inst. 657

2 Hen. IV. c. 15

Section 10 provides for the payment of obventions. Sect. 10

Section 11 provides that tithe of fish may be paid according to custom. Sect. 11

Section 13 provides: That if any person do subtract or withdraw any manner of tithes, etc., then he shall be convented and sued in the King's Ecclesiastical Court, to the intent the King's Judge Ecclesiastical may then and there hear and determine the same according to the King's Ecclesiastical Laws: and that it shall not be lawful unto the Parson, etc., to convent or sue such withholder of tithes, etc., before any other Judge than Ecclesiastical. And if any Judge Ecclesiastical give any sentence, and the Party condemned do not obey the said sentence, it shall be lawful to every such Judge ecclesiastical to excommunicate the said Party. In the which Sentence if the said party excommunicate wilfully stand by the space of 40 days upon Denunciation and Publication thereof in the Parish Church, the said Judge Ecclesiastical may then

1573 A.D. signify to the King in his Court of Chancery, and thereupon require Process De excommunicato capiendo.

Section 14 provides that any Party suing for a Prohibition shall deliver to the Judges of the Court, where such Party demandethe the Prohibition, the true copy of the Libel depending in the Ecclesiastical Court, and under the copy of the Libel shall be written the Suggestion, and in case the Suggestion by two honest and sufficient Witnesses be not proved true within six months, then the Party that is letted of his Suit in the Ecclesiastical Court shall upon Request, without Delay, have a consultation, and shall recover double costs and Damages to be assessed by the Court, where the said consultation shall be so granted.

Section 16. Provided where Custom hath been in many Parts of Wales that of such Chattel and other goods as hath been given with the marriage of any Person, there tithes have been exacted, now the Country being well manured and husbanded, and the Tithe duly paid there of Corn, etc. It is therefore enacted that no such tithes of marriage goods be exacted or required of any Person within the said Dominion of Wales, or Marches of the Same.

13 Eliz. c. 20 Before passing the reign of Elizabeth notice the Statute 13 Eliz. c. 20, which enacted that leases of Benefices or Ecclesiastical promotion without cure not impropriate should not be made for longer time than the Lessor should be resident without absence above 80 days in a year under penalty of losing one year's profits of the Benefice to be distributed by the Ordinary among the Poor of the Parish.

18 Eliz. c. 11, s. 7 And the subsequent statute of 18 Eliz. which confirmed it and provided that after complaint made to the Ordinary and sentence given, the Ordinary shall on request within 2 months grant sequestration of the profits and in default that every Parishioner may retain his tithes and the churchwarden will take the other profits of the Benefice to distribute among the Poor.

More important technically is the Statute de Excom-

municato Cap. passed in 5 Eliz. After reciting the difficulties which arose owing to the writ de Excom. Cap. not being returnable into any Court, but being left to the discretion of the Sheriffs, it provided that every Writ of Excom. Cap. out of the chancery against any Person in England was to be returnable into the King's Bench wherein it was to be recorded and the Judges of the King's Bench were to see it duly executed, and if the return was non est inventum then the King's Bench was to award a writ of Capias, and the Sheriff was to make proclamation thereof, and if the return was that the Person had not surrendered, then a second capias was to issue and a third and so on with penalties for not surrendering on each capias. 1601. A.D. 5 Eliz. ch. 23

And the Sheriff was to deal with the Body on surrender as had formerly been done on an Excom. Cap.

And the Archbishop and Bishops were to retain their power to deal with the person.

And provision was made for sending the tenor of the Significavit by Mittimus to the authorities of the Duchy of Lancaster and other parts where the Queen's writ did not run.

The penultimate section of this Act leaves it doubtful whether it was intended to apply to tithes at all, and the statute is not given in Eagle and Young; but the reference to it in the Act of 53 George III. seems to show that it did in fact govern the practice in tithe cases, although not in Lord Coke's time. post, 112 II. Inst. 661

The Act for the relief of the Poor is also to be noticed. It provides for the Taxation of every Inhabitant, Parson, vicar and others and of every Occupier of Lands, Houses, Tithes impropriate, Propriations of Tithes, Coal Mines or saleable Underwoods in the Parish. But does not take any portion of the Tithes as such, for the objects of the Act as had been done on a prior occasion. It is argued from this fact that the Poor had no claim to any portion of the tithes. But even as recently as 18 Eliz. we have just seen that claim was recognised. There is, however, no 43 Eliz. c. 2

1606 A.D. doubt that such rights as had been given to the Poor by the enactments of Ethelred and Richard II. had never found a machinery adequate to use them.

In 1606 Richard Bancroft, Archbishop of Canterbury, exhibited to the Privy Council against the Judges certain Articles of Abuse which were answered in the following year by all the Judges of England and the Barons of the Exchequer with one unanimous consent. And the Articles and answers are set out in full by Lord Coke in the Institutes where they are to be read, so that we may notice only those which more intimately concern us.

It is noticeable that the 4th Article does not mention tithe, and this is the more remarkable in that more than half the prohibitions in the King's Bench and Common Pleas appear to have been connected therewith. For the answer shows that in the three years preceding 180 out of 313 prohibitions from those Courts were de modo decimando of unity of possession for trees of 20 years' growth and for barren and heath ground: As a picturesque description not without its bearing on future events in the history of tithe notice the answer to Art. 8.

II. Inst. 606 "And where in ancient times such as sued for tithes, would not sue but for things questionable, and never sought at their parishioner's hands their tithes in other kinds then anciently they had been used to have been paid; now many turbulent ministers do infinitely vexe their parishioners for such kinds of tithes as they never had, whereby many parishes have been much impoverished; and for example, we shall shew one record, wherein the minister did demand seventeen severall kinds of tithes, whereupon the partie suing a prohibition had eight or nine of them adjudged against the minister upon demurrer in law, and other passed against him by tryall, and this must of necessity grow to a matter of great charge; but where is the fault, but in the minister that gave occasion? And we will shew one other record, wherein the party confessed to some of us, that he was to sue his parishioner but for a calf and a goose; and that his proctor neverthelesse put in

the libell a demand of tithes of seven or eight things more than he had cause to sue for." 1603 A.D

And Article 9, relates how frivolous suggestions are sometimes made excuses for a prohibition: as upon a suit for tithes brought by a minister against a parishioner, a prohibition flyeth out upon suggestion that in regard of a special receipt, called a cup of buttered beare made by the special skill of the said parishioner to cure a grievous disease called a cold, which sorely troubled the said minister, all his tithes were discharged. Whereto it was answered: It is ridiculous in the minister to make such a contract (if any such were) but that maketh not the contract void, but discovereth the unworthiness of the party that made the same, and yet no fault in granting the prohibition.

And this answer seems almost to admit that the judges did not scrutinise suggestions for a prohibition with strictness.

The answer to the 12th Article admits that the Ecclesiastical Court is entitled to conduct its own proceedings according to its own rules in matters of which it has cognizance. "If the question be upon payment or setting out of tithes we are to leave it to the trial of their law, though the party have but one witness."

The 15th Article and answer are important since they show the border line of the ecclesiastical jurisdiction over tithe. The complaint is that it is alleged that trial of customs in payment of tithes must be in a temporal Court, for upon a quirke and false suggestion in Edward VI.'s time made by some sergeants a conceit hath arisen (which hath lately taken greater strength than before) that ecclesiastical judges will allow no plea of custom or prescription either in non decimando or in modo decimando, etc.

And the answer is: The temporal Courts have always granted prohibitions in cases de modo decimando as in cases upon real compositions, either in discharge of tithes, or in the manner of tithing: For that modus decimandi had his originall ground upon some composition in that kind made, and all prescriptions and compositions in these II. Inst. 610

1618 A.D. cases are to be tryed at the common Law, and the Ecclesiastical Courts ought to be prohibited, if in these cases they had plea of tithes in kind: but if they will sue in the Ecclesiastical Court de modo decimandi, or according to composition then we prohibit them not: and the cause why the ecclesiastical judges find fault herewith, is, because many ministers have growne of late more troublesome to their parishioners, than in times past.

The 17th answer explains that Section I. of 2 Ed. VI. ch. 13, is to be enforced in the temporal not the Ecclesiastical Court and so it has been thenceforth.

The 18th answer explains that if the parson after the tithes are set out sell them to the parishioner that set them out a suit for double value will be prohibited, otherwise a consultation will be granted.

And[1] so an armistice was again arranged so far as the judges were concerned. But the Church had little rest from other opponents. In the years from 1620 to 1650 pamphlets for and against the right of the Church to the Tithe revenue were poured forth literally by the score.

In 1618 appeared[2] Selden's work, which in later times has been perhaps a main instrument in preserving the rights which it discusses. Yet so offensive was the bigotry of Tillesley, the then champion of the supporters of Divine right to tithe, that he could exult over the fact that Selden was made to recant, and boast of his own rushlight as more than an equal for the luminous learning of his opponent. Of the Church view Spelman was a less

[1] The articles which we have omitted in so far as they concern us do not raise any question of principle at variance with what has previously been stated.

[2] Selden was born in 1584, and educated at Oxford and the Inner Temple. In 1618, the History of Tithes, although only published after it had been submitted to the censorship and duly licensed, nevertheless aroused the apprehensions of the bishops and provoked the intervention of the King. The author was summoned before the Privy Council and compelled to retract his opinions. His work was suppressed and himself forbidden to reply to any of the controversialists who had come or might come forward to answer it.

passionate and more able advocate. His larger work of Tithes, though only published in 1646, had been written long before. It puts the arguments in support of Tillesley's view with all possible ability, but they are arguments which are unfortunately no longer now effective. Amongst the crowds of smaller articles we may notice the portion of Godolphin's work devoted to tithes and the book published by Elderfield called "the Civil right of Tithes," whereby the author claims setting aside the Jus Divinum to have estated the clergy in their Tithes by civil sanction or the Law of the land. But none of these works contain anything beyond what their authors had learned from Selden. 1644 A.D.

At last the blow fell and the Church's rights and her jurisdiction were alike for the time being non-existent. It was not long before the Commons found difficulties arising from the Courts being thrown out of gear. In November 1644, an Ordinance was passed for the: Free payment of Tithes, etc., according to the Laws and Custom of the Realm. Ordinance 1644, c. 45 Scobell, p. 74

Whereas divers persons within the realm of England and the Dominion of Wales taking advantage of the present distractions and aiming at their own profit have refused and still do refuse to set out yield and pay tithes, etc., to which they are the more encouraged, both because there is not now any such compulsory means for recovery of them by any ecclesiastical proceedings as had heretofore been, and also that by reason of the present troubles there cannot be had speedy remedy for them in the temporal courts although they remain still due: be it ordained that every person shall truly set out, yield and pay all tithes, etc., and all arrears of them to all the respective owners, proprietors, impropriators, and possessors, as well lay as ecclesiastical, of parsonages, vicarages or rectories, either impropriate, presentative or donative, and of portions of tithes according to the law, custom, etc., by which they ought to have been set out, yielded or paid at the beginning of this Parliament 2 years before.

And in default it is provided that two justices shall act

1647 A.D. on complaint and shall give and enforce judgment, and it is provided that an appeal against such judgment is to be to the Court of Chancery which shall give final judgment thereon.

By an Ordinance of 1646 the Archbishops and Bishops were abolished, and their lands tithe free and their revenues were vested in trustees. But the Ordinance for payment of Tithes does not seem to have worked very well even after the last vestige of the old jurisdiction had been thus swept away. Probably the County Justices in many cases were not very ready to assist the newly appointed ministers. Even the constables appear to have been rather slow to act, for in 1647, the Ordinance, c. 85, recites that doubts have arisen as to whether the ordinance for tithes extended to ministers put by Parliament into sequestrated livings and provides that such ministers may sue by authority of any ordinance. And that the justices mentioned shall upon complaint immediately without delay issue their warrant to summon such persons who refuse to set out or pay, to appear before them at their next monthly meeting, or sooner, and use all possible expedition in hearing and determining the complaints, and shall have power to and shall award treble damages and shall fine constables, etc., for not acting 40*s.*

And because many appeals were brought for vexation and delay it was provided that no appeal should be admitted until the party appealing should lay down in money either with the Justices or in Chancery the full value of the tithes adjudged by way of security, to prosecute his appeal and to render double costs and damages in case no relief was given to the prosecutor of the appeal.

1647 A.D., ch. 88 Another Ordinance of 1647 continued the ministers in their livings who had been placed there by Parliament, and provided that the sheriffs, mayors, bailiffs, justices, Deputy Lieutenants and committees of Parliament were to take effectual course, that all men do pay their tithes or profits due unto the said respective ministers. And the

committee appointed for plundered ministers was to have power to put this in execution. And the committee of complaints was to give the like remedy to all ministers and sequestrators put in by the Parliament against whom any action should be brought by delinquent or scandalous ministers for their tithes, etc. And in short such scandalous ministers were to go to goal for one month. 1665 A.D.

An Ordinance in 1648 continued the Ordinance of 1647 and altered the security for appeal into the full value of the tithes together with treble damages and costs; such costs not to exceed £10. Ch. 121

In 1649 the Deans and Chapters were abolished and their lands were ordered to be sold; but parsonages and tithes appropriated were exempted. Ch. 24

Another ordinance of the same year vested all tithes appropriate, oblations, portions of tithes, etc., belonging to Archbishops, Bishops, Deans and Chapters and others of the hierarchy, as well as the first-fruits and tenths in trustees to maintain preaching ministers. Ch. 31

After the Restoration these and numerous other ordinances of the same sort were not repealed; they were so far as the statutes were concerned simply omitted; if it became necessary to refer to them they were recited as "pretended Acts," and in speaking of anything done under them it was sufficient to say that it was done "in the bad times." But this cavalier treatment did not prevent the ordinances from causing considerable loss to the clergy. Attempts were indeed made to refuse an indemnity but they failed and the Church had to suffer.

Accordingly in 1665 we find an Act passed for uniting Churches in cities and corporate towns, which recites the evils arising from the poverty of the clergy and provides that the Bishop may with the assent of the mayor, aldermen and justices or other chief officers of the town, and of the patron or patrons of the churches or chapels to be united, proceed to unite any churches or chapels in the corporation limits, and after the orders so uniting them or 17 C. II. ch. 3

1676 A.D after the next avoidance, if the churches are full, the parishioners and holders and inhabitants of the parishes and places belonging to such churches or chapels are to pay all such tithes or other duties as belonged or had belonged to the incumbent of any of the said churches or chapels so united to the incumbent of the said presentative church or chapel to which the others were united.

And the patrons of the different churches or chapels were to present by turns.

And provision was made that any owner of impropriate tithes might unite and annex any part of them to the parsonage or vicarage of the parish church or chapel where they arose without license of mortmain.

29 C. II. ch. 8 In 29 Car. II. again an Act recites that divers Archbishops and Bishops and other ecclesiastical persons in obedience to his Majesty's letters bearing date the 1st June 1660, and out of a pious care to improve poor vicarages and curacies have since his Majesty's happy return upon renewal of the leases of rectories or tithes impropriate or appropriate made or may hereafter make divers reservations beyond the ancient rent, that the same might become payable to the said vicars or curates, in augmentation of their endowments which have been for the most part enjoyed accordingly; but in regard that such reservations were not made to the vicars or curates, or if they were, no convenient remedy could be had by such vicars or curates for the recovery thereof, and they were not at the time thereof capable of taking any interest to their own use, whereby the said provisions will depend upon the good pleasure of the successors, and may in time be disappointed—and enacts that any augmentation granted or reserved to or intended for the benefit of any vicar or curate by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary or other ecclesiastical corporation, person or persons whatsoever shall continue afterwards in whose hands soever the rectories may come. Provided that no future augmentation was to

be confirmed by the Act which exceeded one moiety of the clear yearly value of the rectory impropriate. 1676 A.D.

And so it appears that the wounds inflicted by the "Long Parliament" were in a fair way to be healed by the recuperative powers of the country which enabled the Bishops, on the falling in of the leases, to increase the rent reserved.

CHAPTER VI.

FROM THE REVOLUTION TO THE TITHES COMMUTATION ACT.

1696 A.D. HOWEVER great may have been the loss of income, the position of the Church in regard to the law of tithe had not been materially shaken by all the controversy of the 17th century. That this was so appears from the Act of 7 and 8 William and Mary, ch. 7. For the supporters of the Church in Parliament were not likely to trouble about small tithes under 40*s.* in value if the statutes of Henry VIII. and Edward VI. had not been in good working order.

7 & 8 W. III. c. 6. By this new Act: For the more easy and effectual recovery of small Tithes and the value of them where the same shall be unduly subtracted and detained where the same do not amount to above the yearly value of 40*s.* from any one Person; it is provided that every person shall set out and pay all the tithes commonly called small tithes and compositions and agreements for the same, and if any one shall subtract or withdraw or fail in the true payment of such small tithes for twenty days after demand, then on complaint in writing, made within two years, to any two or more justices of the County, neither being a Patron of the Church or Chapel whence the said Tithes arise, such Justices shall summon the person complained of, and after appearance, or in default of appearance, shall hear evidence on oath, and adjudge the case and give such reasonable allowance and compensation for such tithes so withheld as they shall judge to be just and reasonable, and Costs not to exceed ten shillings.

Section 3 provides that upon refusal or neglect to pay

the sum so found due for 10 days after notice, the Constables and Churchwardens, and in case of removal the Constables and Churchwardens of the County removed to shall by warrant from the Justices distrain the Goods and Chattels of the party so refusing or neglecting, and after 3 days shall sell. 1700 A.D.

Section 7 provides for an appeal to Quarter Sessions, and enacts that the proceedings or judgment shall not be removed or superseded by certiorari.

Section 8 provides that if the person complained of insist on any prescription, composition, modus, agreement, or title, to be freed from payment, and give security for cost and damages, then the justices shall not proceed, but the person complaining may proceed in other Courts as before the Act.

By section 9 the judgment of the justices was to be enrolled at Quarter Sessions, and was to be a bar to conclude the parties from any other remedy.

And this Act was continued for seven years by 10 and 11 W. III. c. 15, and was made perpetual by 3 Anne, ch. 18.

An Act in the 1st William and Mary, which freed dissenters from certain penalties, expressly provided that they were not to be exempt thereby from tithes nor from proceedings in the Ecclesiastical Court for the same. But in 7 and 8 Will., special provision was made for Quakers who refused to pay:— 1 W. & M. st. 1, c. 18 sect. 6

Whereas, by reason of a pretended Scruple of conscience Quakers do refuse to pay tithes and Church rates, it is provided that the two next Justices of the Peace of the County, upon complaint, shall summon the person refusing, and order and enforce payment of the amount if under £10. 7 & 8 Will. III. c. 34

An Act had been passed in 3 W. and M. for the better ascertaining of the tithes of hemp and flax, which is interesting as the first direct legislative attempt to get rid of the difficulties of collection by the fixing of a sum certain per acre, in this case four shillings, to be paid to the rector, and this Act was continued by 11 and 12 Will. III. ch. 36, and made perpetual by 1 Geo. I. St. 2, ch. 26. 3 W. & M. ch. 3 11 & 12 W. III. c. 36

1704 A.D. But in spite of the amply sufficient state of the law of tithe, the poorer clergy were undoubtedly very badly provided for.

2 & 3 Anne, c. 11 Whereas a sufficient settled provision has never yet been made for the Clergy in many parts of the Realm (says the Act which confirms Queen Anne's great benefaction), "by reason whereof divers mean and stipendiary preachers are in many places entertained to serve the cures and officiate there who, depending for their necessary maintenance upon the goodwill and liking of their hearers, are under temptation of too much complying and suiting doctrines, and preaching to the humours rather than the good of their hearers;" and then provision is made for the creation of a body corporate to whom all the tenths and first-fruits were to be paid for the augmentation of the maintenance of the clergy who were not sufficiently provided for.

5 Anne, c. 24 And in furtherance of the object of this Act, 5 Anne, ch. 24, discharged all benefices below the value of £50 a year from payment of first-fruits and tenths.

7 Anne, ch. 18 In 1709 an Act provided that usurpation of an ecclesiastical promotion on an avoidance was not to prevent a quare impedit upon the next or any other avoidance.

12 Anne, st. 2, c. 12 In 1713 was passed an Act for preventing any person from buying the next avoidance to any benefice and being presented or collated thereupon, and the first section provided that on presentation of a curate to the bishop or ordinary to be licensed or admitted to serve a cure, the bishop or ordinary having regard to the greatness of the cure and the value of the benefice shall appoint a sufficient stipend not exceeding £50 nor less than £20 per annum.

1 G. I. s. 2, c. 10
3 G. I. ch. 10 In 1 Geo. I. and 3 Geo. I. further provisions were made for administering Queen Anne's Bounty and collecting the tenths, and by the former it was provided that chapels donative or chapels served by stipendiary preachers, when assisted out of the Bounty were to become chapels presentative.

5 G. III. c. 17 A Statute in 5 Geo. III. gave statutory authority to the

custom of Bishops and other ecclesiastical authorities to lease for terms not exceeding three lives or twenty-one years. 1777 A.D.

In 17 George III. an Act was passed to enable parsons or vicars, in cases where the house had become so mean that one year's net income of the living would not be sufficient to repair it, to borrow with the consent of the patron and ordinary to the extent of two years' income so much as was certified to be necessary and to mortgage the glebe tithe or rent for twenty-five years as security. And power was given to the ordinary patron and incumbent to purchase a new house and lands, conveniently situated and to sell part of the glebe or tithes for that purpose. 17 G. III. c. 53

How great was the improvement in the status of the poorer clergy appears from a comparison of 36 Geo. III. with the Statute 12 Anne, II. 12, mentioned above. By the earlier statute the provision was not to exceed £50; now the limit was raised to £75, and the Bishop or ordinary was given power when the rector was non-resident to give the curate the use of the rectory or £15 in lieu thereof. 36 G. III. c. 83

In 39 and 40 Geo. III. an Act was passed concerning leases by ecclesiastical persons. The Acts of 32 Hen. VIII. ch. 28; 1 Eliz. ch. 19; 13 Eliz. c. 10; and 14 Eliz. ch. 11, had made provision against the improper leasing of tithes, being parcel of the possessions of any college, cathedral, chapel, hospital, parsonage, vicarage or other spiritual promotion, and restrained the granting of leases at less than the accustomed yearly rent. The Act of 1800 now provided that in case of a lease of a portion of land formerly leased, less than the ancient rent of the whole might be reserved provided that the aggregate rent of the parts was not less than the old rent, and that if a part only were leased, the rent for the part was not to be less, in proportion to the fine for the part, than the rent for the whole had been to the old fine for the whole. Provision was made for charging stipends paid to vicars on any portion of the leased premises of not less than three times the value required for the stipend. 39 & 40 G. III. c. 41

In 1803 the Statutes mentioned above : 21 Hen. VIII. 43 G. III. ch. 84

1813 A.D. c. 13; and 13 Eliz. ch. 20, were repealed and instead thereof it was enacted that spiritual persons might take leases of houses or lands but not for the purpose of farming the latter for profit.

And a vicar or curate might with the license of the Bishop take a lease of the impropriate parsonage, rectory or vicarage of his parish. And the penalties for non-residence were altered and provisions were made for the Bishops to grant licenses for non-residence. It is to be noticed that in case of sequestration no provision was made for any of the profits to go to the poor as in the Statute of 18 Eliz. ch. 11; but they were to go to improve the parsonage or to Queen Anne's Bounty.

53 G. III. ch. 149 By a Statute in 1813, various alterations were made in the Act of 36 Geo. III. for the support of curates, and again the change points to a great improvement in the position of the clergy. The salary was in no case to be less than £80 per annum and not less than £100 or the full value of the benefice when the population exceeded 300 persons and not less than £150 or the full value if the population exceeded 1000 persons. By section 21 it is provided that when any benefice, donation, perpetual curacy or parochial chapelry is situated within more than one province or diocese, the archbishop or bishop to the Cathedral Church of whose province or diocese the parish church thereof shall be nearest in local situation shall have jurisdiction.

53 G. III. ch. 127 In 1813, a statute for the better regulation of Ecclesiastical Courts in England and for the more easy recovery of Church rates and tithes enacts that excommunication shall be discontinued excepting for matters of spiritual censure and that if the party cited refused to appear or to obey the lawful orders and decrees of the Ecclesiastical Court the judge might after ten days pronounce him in contempt and signify the same to the Chancery and thereupon a writ de contumace cap. should issue and be enforced as the writ de excom. cap. had been under the Statute of 5 Elizabeth. And it was provided that the Act 7 and 8

William III. was to extend to complaints concerning tithes not exceeding £10, and that one justice instead of two might receive the complaint and issue the summons. 1813 A.D.

And the limitation of six years was applied to suits for penalties for not setting out or for the value of tithes, and the limit of £10 in the Act of 1 Geo. I. s. 2, c. 6 as to Quakers was extended to a limit of £50.

Now we are approaching the Tithes Commutation Act, and evidences of the difficulties in the administration of the laws we have been discussing in the now highly developed state of the country appear with ever-increasing frequency.

In 2 and 3 Will. IV., Lord Tenterden's Act was passed "for shortening the time required in claims of modus decimandi or exemption from a discharge of tithes. After reciting that the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented by shortening the time required for the valid establishment of claims of a modus decimandi or exemption from or discharge of tithes, it enacts that all prescription and claims of or for any modus decimandi or of or to any exemption from or discharge of tithes by composition real or otherwise, shall be sustained, where tithes in kind are demanded by any corporation sole other than the Crown, upon evidence showing the payment of the modus, or the enjoyment of the land without render of tithes or anything in lieu thereof during sixty years or such greater period as shall include two incumbencies. But proof that the modus was rendered or exemption enjoyed under some express agreement in writing will be sufficient to defeat the general claim. 2 & 3 Will. IV. c. 100

If the claim is by the Crown or by any person or corporation not a corporation sole it must be shown that the modus was paid or enjoyment had during thirty years, unless some inconsistent payment or render can be proved within the sixty years; but if the proof extends to sixty years, the claim to the modus or exemption is indefeasible.

Hereon a great diversity of opinion ensued as to whether the Act merely prevented the rebuttal of the presumption

1835 A.D. from sixty years' user, by evidence antecedent to the sixty years, or enabled the party to found his claim to exemption on the sixty years' evidence. But this question has now lost its practical interest, and is sufficiently discussed in the notes to Blackstone.

Although the defaulting tithe payer was no longer liable to the terrors of excommunication, yet he might well object to the proceedings in the Ecclesiastical Court, which were still very cumbersome and ineffective for the recovery of small amounts, and proportionately expensive to the losing party.

5 & 6 Will. IV. c. 74 Accordingly, by the Statute 5 & 6 Will. IV. c. 74, it was provided that where the amount was under £10, the proceedings were to be taken under the Acts of 7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, and not otherwise; and similarly provision was made with regard to Quakers, when the amount was under £50, that the Acts above-mentioned were to be used. And execution on the goods of Quakers was substituted for imprisonment of their persons, which was abolished thenceforth.

And in this year, had it not been for political changes, the end would probably have come.

Hansard, III. XXVII. 170 On March 24th, 1835, Sir Robert Peel, Chancellor of the Exchequer, submitted his plan for dealing with tithes to the House. After explaining the difficulties of forming a scheme which arose from the desire to put the matter on a business footing without losing the benefit of the forbearance admittedly practised by the Clergy, he referred to the schemes which had been brought forward in 1833 and 1834 by Lord Althorpe, and propounded his own solution. He would invite a meeting of the tithe payers, and would empower the Commissioners to send down an assistant commissioner to explain matters to them. A majority of two-thirds in value was to bind the other tithe payers, after the scheme had been submitted to the Commissioners.

The money payment for substitution was to be a corn rent, to be fixed according to seven years' averages.

The remedies were to be by action or distress or a summary remedy before magistrates for small amounts. 1836 A.D.

A commission of three members was to be formed, and one member of the Commission was to be appointed by the Archbishop of Canterbury. But Sir Robert Peel's Ministry went out in the next month, and so the Bill was lost.

In the King's Speech of the ensuing year, a measure was announced, having for its end "the rendering this mode of providing for the Clergy more fixed and certain, and calculated to relieve it from that fluctuation and from those objections to which it has hitherto been subject;" and on February 9th, 1836, Lord John Russell moved for leave to bring in the Bill which formed the basis of the Commutation Act. Hansard, III. XXXI. 3 Hansard, III. XXXI. 185

He at once adopted the machinery proposed by Sir Robert Peel. He proposed that when three-fourths in value of the tithe owners agreed with three-fourths in value of the land owners, the agreement should bind the rest, subject to appeal.

But the real gist of the measure was the principle of compulsion: in case of disagreement an assistant commissioner was to go down and settle the values, subject to an appeal.

He hoped that his plan, if it did not settle the question to the immediate satisfaction of all parties, would in a few years leave persons at liberty to cultivate their lands as they pleased.

"The income of the clergy would ultimately flow from the landowners, and not from each tenant or farmer, and the clergyman would be relieved from an alternative, either of making personal enemies by pressing his demand, or injuring himself by abandoning it." The remedy was to be by distress and entry, but not for more than two years' arrears.

The general desire for some scheme was so great that difficulties vanished before it, and on August 5th, 1836, on the motion of the Marquis of Lansdowne, the amend- Hansard III. XXXI. 914

1836 A.D. ments of the Commons upon the Lords' amendments were taken into consideration; and Lord Ellenborough said that the Commons having treated the Lords' amendments in a spirit of great fairness and conciliation, he was very much disposed to accept their amendments without discussion, and so it was.

The end proposed by the Act was to substitute for all tithes moduses and compositions real not already commuted, a corn rent, payable half-yearly in money, the amount regulated by seven years' averages of equal quantities of wheat, barley and oats.

6 & 7 Will. IV. c. 71 Of the Act itself, as it is in every one's ken, it is not necessary to speak in detail. The object is recited to be to provide the means for an adequate compensation for tithes and for the commutation thereof. The first eleven sections deal with the machinery.

Sections 4 to 9 and 11 repealed

Sect. 12 In the 12th section, "owners of lands" or "owners of tithes" is defined to mean and include every person who shall be in the actual possession or receipt of the rents or profits of any lands or tithes (except a tenant for life or years at not less than two-thirds of the net value) and that without regard to the real amount of interest of such person.

Sect. 17 Section 17 provided that the owners of not less than one-fourth in value of the land subject to tithes or of the tithes could call a meeting, and that a majority of not less than two-thirds in value of the lands, and two-thirds of the great tithes, and two-thirds of the small tithes, might proceed to make and execute a parochial agreement for the payment of an annual sum, variable, as was provided by sect. 67, instead of the great and small tithes of the parish collectively or severally, and every agreement so made was to bind all the parish.

The proportional values were to be determined by the values at which the lands or tithes were rated for poor-rate.

The agreement before being confirmed was to be submitted to the Bishop of the Diocese for his opinion. Land not exceeding twenty acres might be given by

agreement, by way of commutation, for the whole or an equivalent part of the tithes, subject to the Commissioners' approval. 1836 A.D.

In case of no agreement, provision was made for the appointment of valuers, and for the action of the Commissioners compulsorily after October 1st, 1838.

By section 37 the Commissioners were to ascertain the clear average value according to the average of seven years preceding 1836, after deducting expenses, except parochial and county rates. Sect. 37

By sections 40 and 41 special provisions were made for the separate valuations of hops, orchards or gardens, and of coppice wood; and by section 42 the Commissioners were empowered to separate the former class into—(1) extraordinary tithes, which were to change to or from the ordinary rent-charge on the cessation or renewal of such cultivation, and (2) ordinary tithes. The amounts of any modus, compositions real or prescriptions or customary payments were to be valued and treated as if they were tithes. Sects. 40 & 41 Sect. 42

The Commissioners were to hear and determine any pending suits, and on the termination thereof were to award the total sum to be paid for the tithes of the parish, and to hear and determine objections, and to confirm and publish the award.

Valuers appointed by the owners of land subject to tithes in the parish were to apportion the amounts to be paid and received. And in default of the completion of the valuation in six months, the Commissioners were to apportion.

Provisions were made by sections 56 and 57 for the publication each year in the Gazette of the average price of corn calculated from the weekly averages in the preceding seven years, and for the proportional valuation of the tithe rent-charge on the basis of such price at the time of the apportionment. After the final confirmation by the Commissioners, copies were to be sent to the Registrar of the Diocese and to the Incumbent, and the confirmed apportionment, and every recital or statement in it, or map

1836 A.D. annexed to it, or sealed copy thereof was to be deemed satisfactory evidence of the matters therein recited or of the accuracy of the plan, and the confirmed apportionment was not to be impeached on the ground of mistake or informality.

By section 67 all lands of the parish after the 1st January following a confirmed apportionment were to be absolutely discharged (subject to a temporary exception) from tithes, and instead thereof there was to be payable a sum of money in the nature of a rent-charge issuing out of the lands charged therewith. Such sum was to be payable by equal half-yearly payments, on the 1st January and the 1st July, which might be recovered by distress and entry; and was to vary so as to consist always of the price of the same number of bushels of wheat, barley and oats according to the next preceding advertisement.

But the Act was not to render any person whomsoever personally liable to the payment of any such rent-charge.

Sect. 69 The rent-charge was to be subject to all parliamentary, parochial and county and other rates and charges in like

Sect. 70 manner as the tithes had been, and all such rates and charges were to be assessed upon the occupier, and recovered from him as any poor-rate assessed on him of the lands occupied, and when paid might be deducted by the occupier from his rent, and by the landlord from the tithe rent-charge.

Sect. 71 The rent-charge was to be subject to the same rights and incidents as the tithe was before the Act.

By section 72 provision was made for altering the apportionment on lands of one owner, with the consent of two justices.

The expenses of witnesses and of the award were to be dealt with by the Commissioners, and the expenses of the apportionment were to be borne rateably by the owners of lands included; and the Commissioners were given powers to recover such expenses, and, in the case of limited estates and ecclesiastical benefices, it was provided that the payment thereof might be spread over twenty years.

If a tenant holding at a rent-rack at the time of commu- Sect. 79
tation preferred not to be affected thereby, the landlord might take the tithes during the tenancy. Or if the tenant held tithe free, he might pay the tithe and deduct Sect. 80
the amount from his rent.

Section 81 enacted: That in case the said rent-charge Sect. 81
shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in possession, to distrain upon the lands liable to the payment thereof, or on any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress.

And by section 82 it is provided that in case the said Sect. 82
rent-charge shall be in arrear and unpaid for the space of forty days next after any half-yearly day of payment, and there shall be no sufficient distress on the premises liable to the payment thereof, it shall be lawful for any judge, upon affidavit of the facts, to order a writ to be issued, directed to the sheriff of the county in which the lands chargeable are, requiring the sheriff to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the Inquisition to one of the Courts at Westminster, on a day therein named, a copy of which writ, and notice of the time and place of executing the same shall be given to the owner of land, or left at his last known place of abode, or with his known agent, ten days previous to the execution, and the costs of such Inquisition shall be taxed, and thereupon the owner of the rent-charge may sue out a writ of Habere facias possessionem, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable there-

1836 A.D. with until the arrears of rent-charge found to be due and the costs, and the costs of cultivating and keeping possession of the lands, shall be fully satisfied: Provided that not more than two years' arrears over and above the time of such possession shall be at any time recoverable. And power was given to any judge to order an account of the receipts arising from such possessions and to order

Sect. 84 payment of the surplus, and to give other relief. It was specially provided that, in the case of Quakers, the distress might be on their goods whether on the premises or elsewhere, and that the goods distrained might be sold summarily without being impounded or kept.

Sect. 85 When the rent-charge was in arrear, the distress might be made on any other lands within the parish occupied by the same owner or under the same landlord.

Sect. 88 Section 88 provided that subsisting leases of tithes might be surrendered; and—

Sect. 90 Section 90 provided that nothing in the Act was to extend (unless by special provision in some parochial agreement) to any Easter offerings, mortuaries, or surplice fees, or to the tithes of fish or of fishing, or to any personal tithes other than the tithes of mills, or any mineral tithes, or to any payment instead of tithes arising or growing due, within the City of London,[1] or to any permanent rent-charge or other rent or payment in lieu of tithes, calculated on the rent or value of any houses or lands in any city or town under any custom or private Act of Parliament.

[1] We have not followed the course of the law of tithes in London, as it has always been perfectly distinct, so far as it can be followed, from the general law of the country. The history of it practically begins with the exemption of London from the operation of the Statutes of 27 & 32 Henry VIII. Tithe was paid according to the Statute of 27 Henry VIII. c. 21, until the Statute of 31 Henry VIII. c. 12; and the ensuing decree of 37 Henry VIII. settled the payments in much the same form as that in which they now exist. A discussion of the words of the decree is to be found in II. Inst. 659. Any interest which the question might have had for us is taken away by the fact that the parson could not sue for the tithes in the Ecclesiastical Court.

The most satisfactory test of the Act is afforded by its success, and this is sufficiently evidenced by the fact that the reported decisions on points of any importance connected with tithes since 1836 are remarkably few. Of amending Acts there have been over a score, but they are all more directed to rendering the machinery more easily workable, rather than to amending in any way the principles of the Act. And so these Acts really relate to something quite different from the law of tithes, which indeed can hardly be said to have existed at all since 1836. One of the first difficulties to arise was the uncertainty of the boundaries, especially the boundaries of parishes; and to obviate this the Commissioners were given powers to determine the boundaries of parishes and districts, subject to removal of the question by certiorari, and were authorised to confirm an apportionment, although they were not satisfied of the accuracy of the maps and plans; but such maps and plans were not then to be evidence. An amendment was made as to the levying of rates on the rent-charge on occupiers, so that the owner of the rent-charge might be primarily liable for the rates, and the occupiers only liable to the extent of the current rent-charge payable by them. 1839 A.D. 7 Will. & 1 Vict. c. 69

By 2 and 3 Vict. c. 62 it was provided that where a merger[1] took place, the lands were to be subject to incumbrances formerly chargeable on the tithes or rent-charge, and that such charge might be apportioned on any part of the land of not less than three times the value of the charge, and a similar provision was made for apportionment of a charge on the rent-charge where there was no merger. Provision was made for merger of tithe or rent-charge arising out of the glebe, and for extending the agreement sections of the Act to Easter offerings, surplice fees, mortuaries, and the tithes of fish or fishing, or mineral tithes, and for substituting a fixed rent-charge for a contingent rent-charge in certain cases; and further provisions 2 & 3 Vict. c. 62

[1] An Ancillary Act was passed to facilitate the merger of tithes in 1 & 2 Vict. c. 64.

1840 A.D. were made as to the tithes of lammas lands and commons, and as to extraordinary tithes.

3 & 4 Vict. c. 15 — In 3 and 4 Vict. various extensions of these powers were enacted, and further provisions were made as to extraordinary tithes, and the Commissioners were authorised to cause a new apportionment to be made in cases where more than 100 small tenements which had not paid tithe during the seven years of average had been included. By 4 and 5 Vict. the Act of 5 and 6 Will. IV. c. 74 was extended to all suits in the Ecclesiastical Courts for the recovery of sums under the amounts therein mentioned.

4 & 5 Vict. c. 36

5 & 6 Vict. c. 54 — In 5 and 6 Vict. c. 54 various extensions were given to the powers of the Commissioners, and power was given to the tithe owners to let land taken possession of for non-payment of the charge, and provision was made for an owner or occupier of one part of lands charged who had paid more than his share of the charge to recover the excess from the owners or tenants of the other parts.

7 & 8 Vict. c. 85 — In the Railways Act, 7 and 8 Vict., provision was made for the recovery of the rent-charge upon lands taken for the purposes of a railway.

9 & 10 Vict. c. 73 — In 9 and 10 Vict. powers were given to landowners to redeem a rent-charge not apportioned which did not exceed fifteen pounds for not less than twenty-four years' purchase, and after apportionment to redeem separate rent-charges not exceeding twenty shillings for not less than twenty-four years' purchase, and further powers as to apportionment and merger were given to the Commissioners.

14 & 15 Vict. c. 25, sect. 4 — In 14 and 15 Vict. it was provided that if a tenant quitted land, leaving the tithe rent-charge, which he was liable to pay by the terms of his tenancy, unpaid, the landlord might pay it and recover from the tenant as a simple contract debt. It should be noticed that this provision does not really make the tenant personally liable to the tithe rent-charge as such, but only as part of the terms of his tenancy.

23 & 24 Vict. c. 93 — Various powers as to the conversion of corn rents into

rent-charges were given, and provision was made for a re-apportionment when the owners of lands charged consented, or in cases where the boundaries of parishes had been altered; and further provisions were made as to commutations and redemption and apportionment. 1886 A.D.

The Act 31 and 32 Vict., amended by 39 and 40 Vict. made some changes in the machinery. 31 & 32 Vict. c. 89 39 & 40 Vict. c. 40

By 41 and 42 Vict. it is enacted that where the rent-charge does not exceed twenty shillings, the owner may redeem for twenty-five years' purchase, and that if the rent-charge exceeds twenty shillings, the owners of the land and the rent-charge may redeem for not less than twenty-five years' purchase. 41 & 42 Vict. c. 42

And if land is divided up into numerous plots for building or other purposes, the rent-charge may be redeemed, on application of the owner thereof, on payment of not less than twenty-five years' purchase.

By 48 and 49 Vict. chap. 32, the powers and provisions of the Commutation Act were extended to all corn rents, rent-charges, and money payments, payable out of lands by virtue of any Act of Parliament in lieu of tithes; and by an Act of 1886, adequate powers were given for the purpose of securing the redemption of extraordinary tithes; and it was provided that no extraordinary tithe should be levied on any hop ground, orchard, etc., newly cultivated after the passing of this Act. And so the last vestige of anything resembling the tithes of old times vanishes. 49 & 50 Vict. c. 54

THE END.

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